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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees,

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

HERBERT J. MILLER, JR.
NATHAN LEWIN
R. STAN MORTENSON

MILLER, CASSIDY, LARROCA
& LEWIN
2555 M St., N.W., Suite 500
Washington, D.C. 20037
Attorneys for Appellant

RAYMOND G. LARROCA
MARTIN D. MINSKER
WILLIAM H. JEFFRESS, JR.

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-106a)[1] is reported at 408 F. Supp. 321. Opinions of the court of appeals concerning the convening of the three-judge district court (J.S. App. 139a-202a) are reported at 513 F.2d 427 and 430.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 107a-108a) was entered on January 7, 1976. A

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement.

notice of appeal (App. 496)[2] was filed on March 4, 1976, and appellant's jurisdictional statement was filed May 3, 1976. This Court noted probable jurisdiction on November 29, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 9, clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article II, Section 1, clause 1 of the Constitution provides in relevant part:

> The executive Power shall be vested in a President of the United States of America.

Article IV, Section 3, clause 2 of the Constitution provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

[2] "App." refers to the Appendix.

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title I of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. 2107 note and 3315-3324 (Supp. IV, 1974), is set out in Appendix I to this brief (pp. 1a-7a, *infra*).

QUESTIONS PRESENTED

1. Whether the fundamental principle of separation of powers mandated by Articles I, II and III of the Constitution is violated by a legislative enactment that deprives a former President of any control over the confidential papers and effects accumulated by him and his staff while in office and vests complete authority over such material in the Administrator of General Services pursuant to regulations to be approved by Congress.

2. Whether the provisions of the Presidential Recordings and Materials Preservation Act which authorize immediate access and review by the government, and ultimate access by the public generally to the confidential deliberations of a President after he has left office, without a preliminary showing of particularized

need for specific items and merely for historical purposes, violate the constitutional privilege of confidentiality and exceed the power of Congress.

3. Whether the Presidential Recordings and Materials Preservation Act violates the Bill of Attainder Clause because it constitutes a "trial by legislature" in which a specific individual has been found untrustworthy rather than setting out a rule of general applicability to be administered pursuant to a judicial proceeding.

4. Whether appellant's constitutional right to privacy, protected by various provisions of the Bill of Rights, is violated by statutory seizure of *all* the papers and effects accumulated in his home and office during a five year period, and by government screening of every item and conversation seized, including intra-family communications and recordings of personal and political conversations.

5. Whether the First Amendment rights of appellant and his advisors to free speech and association are infringed by the governmental and potential public access to his materials granted by the Presidential Recordings and Materials Preservation Act.

STATEMENT

Richard Nixon served as President of the United States from January 20, 1969, to August 9, 1974. Upon leaving office, Mr. Nixon, in keeping with the practice of every prior President, instructed his staff to arrange for the collection and transfer to him of his presidential materials. He anticipated they would be kept near his home in California until the creation of a permanent repository established under the Presidential Libraries Act, 44 U.S.C. 2101, 2107 *et seq.* (1970)

(App. 169-170). The instructions given staff members concerning the assembly of these materials were the same as those given by William J. Hopkins, a career White House employee since the administration of Herbert Hoover, for the removal of President Kennedy's materials from the White House during the first few days of the Johnson administration (App. 198-209). As in the case of other mid-term transitions, staff members were instructed in writing to retain copies of any files needed for ongoing matters. The packaging and preparation of the materials proceeded in accordance with earlier traditions until they were halted by representatives of the new administration at the behest of the Watergate Special Prosecutor. On the new administration's instructions, the materials were retained in Washington. Deposition of Philip W. Buchen, Vol. II, 70-76.[3]

In order to clarify the question of legal title to these materials, Counsel to President Ford requested an opinion from the Attorney General. A preliminary opinion, delivered by the Deputy Attorney General on August 29, 1974, and subsequently confirmed in a formal opinion by the Attorney General, advised the White House that the former President had title to these materials, but that they were subject to judicial process. 43 *Op. Att'y. Gen.* 1 (App. 220-230).

During the succeeding week, discussions were held between Mr. Nixon's counsel and legal representatives of President Ford concerning the arrangements for

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[3] The depositions of Philip W. Buchen, John Nesbitt and Arthur F. Sampson, taken in *Nixon* v. *Sampson, et al.*, 408 F.Supp. 321 (D.D.C. 1975), are incorporated in the record of this case by stipulation dated July 31, 1975.

disposition of the materials. President Ford's Counsel informed Mr. Nixon's attorneys that the Special Prosecutor had requested access to the materials and that any proposed disposition would have to accommodate the Special Prosecutor's interest. To this end, and in keeping with his long-standing intention to donate most of his presidential materials under appropriate access restrictions to the United States for inclusion in a library, the former President offered to deposit his papers with the government pursuant to the Presidential Libraries Act (App. 38-43).

To assure the Special Prosecutor that *none* of the materials would be destroyed, and at the same time guarantee that access to the materials could not occur without the former President's knowledge, Mr. Nixon's attorneys proposed a "two-key" storage system whereby neither the former President nor the General Services Administration could gain access to the papers or tapes without the consent and presence of the other (App. 39). Mr. Nixon agreed that the two-key deposit would continue for at least three years (five years for all audio recordings) during which time none of the materials could be withdrawn by Mr. Nixon and none could be destroyed (App. 40-42). The former President's agreement specifically provided that all of the materials would be subject to subpoena or other process for use in any criminal or other proceeding in which the subpoenaing party demonstrated a lawful right of access (App. 40-41). A letter incorporating these terms (hereinafter occasionally called "the depository agreement") was sent by appellant to the Administrator of General Services (the "Administrator") who signed the agreement on September 7th, after conferring with Counsel to President Ford (App. 38-43).

The terms of the depository agreement were patterned after the terms of initial deposit contained in the letters of former Presidents Johnson, Eisenhower, Truman and Hoover, each of whom, like Mr. Nixon, had retained the right ultimately to withhold certain materials from deposit or to restrict from general public access other materials because of their nature and the impact their release might have (Johnson, App. 96-102; Eisenhower, App. 83-88; Truman, App. 76-82; Hoover, App. 63-71). Mr. Nixon's proposed agreement was designed primarily to serve, as had initial deposits of the prior Presidents, as an interim step in the creation of a presidential library which would house materials of the Nixon administration.[4]

Following the Administrator's acceptance of the depository agreement, the incumbent administration refused to implement it because the Special Prosecutor insisted that he and his staff were entitled personally to review any recordings or other materials he desired and was not required, as the depository agreement contemplated, to proceed by subpoena. For several weeks attorneys for Mr. Nixon and the Special Prosecutor's Office searched for an acceptable accommodation which would permit files having no relevance to the Special Prosecutor's investigations to be transferred to Cali-

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[4] Despite the impediment posed by the challenged legislation to the creation of such a library, the former President has continued to pursue that course. In April 1975, Mr. Nixon and the University of Southern California announced that an agreement has been reached under which, in the event the challenged statute is declared invalid, the materials of Mr. Nixon's Presidency will be placed in a facility on the USC campus in Los Angeles under terms equivalent to those applicable to the materials of all other former Presidents (App. 418).

fornia under the depository agreement (Special Prosecutor's Motion to Intervene, *Nixon* v. *Sampson, et al.*, 408 F.Supp. 321 (D.D.C. 1975)). These negotiations reached an impasse in mid-October, and on October 17, Mr. Nixon filed suit against the General Services Administration, Counsel to President Ford, and the Secret Service to enforce compliance with the terms of the agreement. Mr. Nixon informed the court at the time the suit was filed that he was exempting from his requested relief the current transfer of any materials which the Special Prosecutor might designate as potentially related to his investigations (Application for Temporary Restraining Order and Plaintiff Nixon's Response to the Special Prosecutor's Motion to Intervene, *Nixon* v. *Sampson, et al., supra*).

The Special Prosecutor promptly moved to intervene in the civil suit, as did columnist Jack Anderson, who had filed a blanket Freedom of Information Act request for access to all of Mr. Nixon's presidential materials, the eleven *Hellman* plaintiffs, including playwrights, authors and lawyers, self-identified as a committee of public citizens seeking access to 147 tape recordings of presidential conversations to conduct their own Watergate investigation, and various committees and other individuals representing reporters, historians and political scientists who stated their intention to request access to the former President's materials. The Special Prosecutor's intervention request was not opposed by Mr. Nixon. The court granted various motions to consolidate and intervene, as well as the motions of Senators Ervin, Nelson, and Javits, and Representatives Hays, Brademas and Holtzman to appear as *amicus curiae* (Orders dated November 11, 1974, *Nixon* v. *Sampson, et al., supra*).

On December 9, 1974, while various motions in the district court were pending, Congress enacted the Presidential Recordings and Materials Preservation Act, which is the subject of this litigation. The Act nullified the depository agreement, authorized the seizure of all of the presidential papers and effects of Richard Nixon, and directed the GSA to arrange first for government and then for public access to those materials (App. I, 1a-7a, *infra*). The bill was signed by President Ford on December 19, and on the following day appellant filed this action, seeking declaratory and injunctive relief against enforcement of the Act on a variety of constitutional grounds. A three-judge district court was convened after actions by the court of appeals on appellant's petition for a writ of mandamus. (*Nixon* v. *Richey*, 513 F.2d 427, *motion for reconsideration granted*, 513 F.2d 430 (D.C. Cir. 1975) (J.S. App. 139a-195a)).

The three-judge court determined that it had jurisdiction under 28 U.S.C. 2282 and granted motions to intervene filed on behalf of the Watergate Special Prosecutor, the Reporters' Commitee for Freedom of the Press, et al., Lillian Hellman, et al., and Jack Anderson (the later three intervenors to proceed on a joint basis). Evidence consisting of affidavits, depositions, documentary exhibits and stipulations was submitted by the parties, and the case was briefed and argued orally. On January 7, 1976, the court, in a 104-page opinion by Circuit Judge McGowan, denied appellant's requests for relief and dismissed the complaint. The court entered an injunction barring, with certain exemptions, processing and access to the materials pending this appeal from its decision (J.S. App. 107a-108a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents constitutional questions of enduring significance to the operation of our government, but it arrives at this Court with three distinct handicaps:

First, the Act that is being tested for constitutional validity is characterized and defended in this litigation on grounds that differ greatly from those that prompted its enactment. From the briefs of the appellees both here and in the district court[5] and from the decision of the court below[6] one would suppose that the Act is a neutral law dealing forthrightly with the difficult problem described in its title—preservation of presidential materials and recordings. In fact, examination of the origin of the law, its legislative history, and the hearings that have been held on proposals for its administration reveal that it was principally intended by Congress to force public disclosure of documents and recordings related to what has come to be known as the "Watergate affair."

Second, in an effort to rescue a law that was drafted in great haste, the appellees urged the district court to narrow its inquiry on the totally fanciful hypothesis that the Administrator might promulgate implement-

[5] *See, e.g.,* Motion of the Federal Appellees To Affirm, p. 15 ("Legislation regarding the materials from appellant's term as President is supported by the strong need for access by government officials to the materials as well as for general historical purposes."); Motion To Affirm of the Reporters Committee, et al., pp. 18-19.

[6] *See, e.g.,* J. S. App. 48a-49a ("The simplest way of describing the public interests served by the Act is to merge all of them under the rubric of preservation of an accurate and complete historical record.")

ing regulations that would moot appellant's claims. The district court accepted this contention, and its lengthy opinion focuses upon a single limited constitutional question which, in its view, was the only issue ripe for decision. Although such a tunnellike view of this case reduced the district court's burden, it mischaracterizes the true and immediate impact of the Act on the appellant and on those who have succeeded and will succeed him in the Presidency.

Third, the case arrives here while public passions are still high. The admonition first delivered by Mr. Justice Holmes in *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400-401 (1904), and quoted by Mr. Justice Harlan in his dissent in *New York Times Co.* v. *United States,* 403 U.S. 713, 752-753 (1971), seems prophetically to fit this case:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

It is difficult to believe that a Congress not preoccupied with what it called the "Watergate affair" would have chosen to "preserve" presidential materials in the manner that this Act does. Yet Congress' hasty decision, enacting into law the public's "immediate interests," now subjects this Court to the "hydraulic pressure" that, in Justice Holmes' view, causes "even well settled principles of law [to] bend."

I

Among the most firmly settled principles of constitutional law is the doctrine of separation of powers. James Madison, in The Federalist No. 47, described it as an "essential precaution in favor of liberty" and as "the sacred maxim of free government." Paraphrasing the metaphor utilized by this Court in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), separation of powers means that each of the three branches of government is "master of its own house." It is difficult to conceive of any subject that is more clearly a matter of internal housekeeping and, therefore, exclusively within the control of each branch of government, than the custody and disposition of materials that reflect the internal operations of that branch. The manner and content of the deliberative process of the Presidency is not subject to control or intrusion by Congress. Consequently, Congress has no power to dictate the terms for disposition of the materials which are a part of that process.

1. Notwithstanding the district court's characterization, our separation of powers argument does not proceed from the notion that the three branches are "airtight" compartments that have no relation with one another. Rather, we argue that the test is one of interference by one branch in matters that are inherently part of the internal affairs of another. The President has various powers that he may exercise without accounting to the Congress for his reasons: the veto power and the power to make executive and judicial appointments are but two examples. Congress surely may not force a President ever to disclose publicly *why* he has vetoed a law or *why* he has selected one candidate for appointment over another. It likewise cannot place

the decision to disclose such matters in the hands of a subordinate executive officer and prescribe the terms he is to follow. In this regard, the interference is no less an encroachment on presidential prerogative than was the Tenure of Office Act of 1867, which this Court declared unconstitutional as an infringement upon the President's exclusive powers in *Myers* v. *United States,* 272 U.S. 52 (1926). And the historical circumstances underlying this law—a reaction by Congress to a Chief Executive to whom it was hostile—are strikingly similar to those that prompted enactment of the Tenure of Office Act.

2. Our basic separation of powers claim is buttressed by the necessary impact of this law upon the confidentiality of presidential communications which this Court recognized in *United States* v. *Nixon,* 418 U.S. 683 (1974), as "rooted" in the President's Article II powers. In a major respect, this case is the converse of *United States* v. *Nixon,* in that the Act seizes *all* presidential conversations in a "broad, undifferentiated" manner, and authorizes restrictions upon publication only where a privilege is affirmatively established. We submit that the privilege recognized by this Court in *United States* v. *Nixon* extends to all records of the "internal operations" of a President's office—whether or not they are communications made directly to the President. Public disclosure of such memoranda or correspondence will seriously inhibit the freedom with which presidential advisers, or those who deal with them, will exchange ideas. This is particularly true if, rather than being presumptively privileged, internal presidential documents are to be disclosed *unless* an incumbent or former President succeeds in affirmatively establishing that they should remain confidential.

3. We argue below that the distinction drawn by the district court between an incumbent President and a former President, for the purpose of presidential confidentiality, is not supported by any policy or precedent. The privilege recognized in *United States* v. *Nixon* is designed to foster total confidence in a particular relationship. Like other confidentiality privileges, it must endure beyond the termination of the relationship. The United States now concedes that even if a former President dies the privilege survives and attaches to the communication. The presidential privilege should not be confused—as the district court confused it—with the privilege that shields state secrets. Such an informational privilege may be exercised only by an incumbent because he is in a unique position to evaluate the harm that will be caused by disclosure.

4. Our view regarding the inherent nature of the President's authority to control the record of internal operations of his office is supported, as well, by the unbroken tradition recognizing a President's "ownership" of his presidential materials. Such a tradition constitutes the "usage" which may clarify and serve as a "gloss" on broad constitutional language. As long ago as 1841, the principle of individual ownership of presidential papers was accepted by Mr. Justice Story. And it has been repeatedly approved by congressional acquiesence and by deliberate legislative enactments designed to induce former Presidents to transfer their presidential materials to the government.

5. The district court maintained that notwithstanding the claim of presidential confidentiality that could be made with regard to some of these materials, there were substantial "public interests" justifying Congress' action, and these "public interests" outweighed

the intrusion on presidential confidentiality. We contend, however, that this "balancing test" of interests is an erroneous standard by which to decide whether the separation of powers principle has been violated. None of the separation of powers decisions issued by this Court, down to its recent decision in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), turned on a "balancing of interests," and such an analysis misapprehends the constitutional issue. The question is not whether a particular encroachment by one branch or another is justified, but whether there has been an encroachment at all in light of the historical allocation of functions.

Moreover, the "important public interests" referred to by the district court do not withstand close scrutiny. The principal interest that is cited—"preservation of historical materials"—is a highly debatable proposition when applied to the deliberative process of government, which requires confidentiality. It is the task of each branch to decide, on its own, whether the interests of historical "research" warrant the loss of confidentiality that accompanies the historian's curiosity. Nor does the "interest" of making documents available for ongoing government business withstand analysis. In two hundred years, ongoing government business has never occasioned an incumbent's access to all of the personal, political and official files of his predecessor. If the issue should ever arise as to particular items, it can be worked out informally between the incumbent and the former President—as it has been in the past—or formally, if necessary, in accord with the rule announced by Mr. Justice Story that implies a legal obligation on a former President to permit access to specific papers needed for current government use.

6. Our final separation of powers argument is that the Act must be invalidated not only because it directly inhibits presidential activity that is inherently part of the Chief Executive's function, but also because it sweeps far beyond the materials and the remedies needed even to achieve Congress' stated objectives. We argue that legislative encroachments on executive power must be judged on their face, like statutes dealing with free expression, because the constitutional danger in both instances is that constitutionally guaranteed activity will be "chilled." By this standard—as well as by the standard requiring that legislation affecting constitutionally secured liberties be narrowly tailored to achieve legitimate ends—the Act is impermissibly broad.

II

In a second respect—also related to the separation of powers doctrine—the Act is a highly unusual exercise of legislative authority. Congress dealt not with the subject of presidential materials generally. Instead, it limited the Act, by specific reference, to the materials of Richard Nixon. It is clear from the legislative history and from various references in the opinion of the district court, that the reason for the Act was Congress' distrust of the former President and its allocation of personal blame to him. On this account, he was apparently thought by Congress to be an unreliable custodian of the materials of his Presidency.

Such a legislative judgment of individual distrust or culpability conflicts with the important separation of powers principles that underlie the constitutional Bill of Attainder Clause. The policy of that Clause was discussed extensively by this Court in *United States* v. *Brown,* 381 U.S. 437 (1965), and it was concluded that

the Constitution prohibits "trial by legislature" and requires that questions regarding the blameworthiness of individuals be decided by courts and juries. It is Congress' function to enact "generally applicable rules." By this standard it might permissibly have provided for the transfer of records of any federal official *found by a court* to be an unreliable custodian. But, as noted in the *Brown* opinion, Congress "cannot specify the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461.

Richard Nixon has been "specified" in violation of this principle. Since the purpose of a judicial trial or quasi-judicial proceeding is to afford a party subject to a governmental order an opportunity to be heard, to present a defense, to cross-examine witnesses, and to argue questions of law and fact, the deprivation of these procedures by "legislative trial" is highly prejudicial. There were no hearings by the Senate or House to consider the "unreliable custodian" allegation. Congress reached its conclusion from the evidence it had secured in the course of various "Watergate" investigations, and on that basis formed an individualized judgment regarding Mr. Nixon.

Finally, there is no substance to the argument, adopted below, that the Bill of Attainder Clause can be violated only by "punishment" in the literal sense. This Court in the *Brown* case held that "preventive" legislative actions directed at specific individuals or groups violate the Bill of Attainder Clause as surely as "vindictive" or "punitive" laws. Here it was Congress' desire to "prevent" Mr. Nixon from exercising the authority of ultimate control and disposition over his presidential materials. That was an adequate "preventive" purpose to call the Bill of Attainder Clause into

play. Moreover, the personal consequences of this wholesale seizure of his papers and effects is enough of a personal injury to the former President to qualify as "punishment" by traditional standards.

III

The district court believed that "the most troublesome challenge" to the Act's constitutionality related to its effect on the former President's right of privacy. The unique needs of the Presidency—a job which requires its occupant to be available and protected around-the-clock—make it difficult for any individual holding that position to keep his private thoughts and communications physically separated from his official records. Furthermore, the district court recognized that Mr. Nixon had every legitimate expectation that, at the end of his service, he would be permitted to review the materials of his years in office and remove from the files those items that were entirely personal. This procedure had been followed by every President who preceded him since the birth of the Republic, and it had been ratified by congressional and judicial action and acquiescence. Yet there are now among the materials that have been seized, beyond the former President's power of removal, personal notes from his daughters, private correspondence with friends, relatives and former law partners and—most private of all—tape recordings of family conversations and of personal and political thoughts which Mr. Nixon often dictated for future recollection at the conclusion of his working day.

This Act seizes all these materials in total and establishes a procedure whereby they will be meticulously

reviewed and transcribed by a large number of government employees whom Mr. Nixon does not know and whom he has never authorized to intrude into his personal life. This sequence, under which material is first seized and searched and, only after the intrusion is completed is the decision made as to which items should be kept and which returned, is identical, in every significant regard, to the "general warrant" that was a principal target of the prohibitions contained in the Fourth Amendment. The vice of a general search is particularly aggravated when the items being searched are an individual's written or recorded thoughts—reflected in his "private papers"—for these are the very essence of privacy, as is demonstrated by eloquent judicial declarations ranging from the classic ruling in *Entick* v. *Carrington,* 95 Eng. Rep. 807 (1765), through Mr. Justice Brandeis' dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928), to observations by Judges Learned Hand and Henry Friendly.

Granting, *arguendo,* the legitimacy of Congress' interest in securing official documents in order to maintain a complete historical record, neither the arguments on this case nor the legislative history of the Act contains a valid reasons why the former President should not be given the same opportunity afforded to any individual upon whom a subpoena is served to sort out those items that are sought by the official demand from those that have no bearing upon it. Indeed, at least one of the analogies relied upon by the district court—the A.L.I. Model Pre-Arraignment Code—explicitly provides this protection for privacy even in the case of a criminal investigation.

The district court's attempt to analogize the seizure accomplished by this Act to the electronic surveillance authorized by federal law is unsound because the target of such surveillance obviously cannot be relied upon to notify those listening which conversations constitute evidence of crime. Moreover, electronic surveillance is authorized by federal law only pursuant to six "precise and discriminate" statutory requirements that are essential preconditions to constitutionality. None of the six is provided by this Act.

In addition to violating Mr. Nixon's Fourth Amendment right to privacy, the Act intrudes into thousands of conversations and documents that are purely political in nature. The President is, at the same time, the Chief Executive of the United States and the head of the national political party he represents. Mr. Nixon had numerous conversations during his Presidency which were strictly in the area of political association and did not constitute the execution of official duties. The involuntary disclosure of all such conversations and all such documents to the many government employees involved in the review process, and their possible ultimate disclosure to the public, violates rights guaranteed by the First Amendment. And the combined effect of the intrusion on privacy of an individual who occupies this political post has the same constitutionally impermissible consequences as this Court has discerned in various circumstances involving an intersection of the First and Fourth Amendments—most notably in the relatively recent ruling declaring unconstitutional warrantless wiretaps conducted for "domestic security" purposes. *United States* v. *United States District Court,* 407 U.S. 297 (1972).

ARGUMENT

Preliminary Statement

Before turning to a discussion of those areas in which we challenge the constitutionality of Congress' hasty and ill-conceived legislation, we believe it is important to describe what the Act reaches and how it works so as to evaluate its immediate impact on the appellant.

A. The Materials at Issue

A description of the nature of the materials that this Act reaches demonstrates, we believe, that Congress has interjected itself into the internal operations of the Presidency in a way that may alter the future political and professional careers of hundreds of individuals and that sanctions a massive intrusion upon the private lives of Mr. Nixon, his family, and scores of others who communicated with him assuming that their conversations were confidential. In keeping with the structure of the Act, which separately authorizes the seizure of Mr. Nixon's recorded conversations and the seizure of all other presidential material, we first discuss the content of the recordings and then the nature of the documentary material.

1. *The tape recordings*

Section 101(a) of the Act directs the seizure of some nine hundred tape recordings which contain nearly every conversation that took place over the course of two and a half years in the former President's offices, in certain parts of his residences, and on various telephones serving those areas (App. 218). These recordings are most central to the issues raised by the Act

because they involve highly intimate and confidential discussions. Because the recordings were voice-activated (App. 218-220), they even contain Mr. Nixon's private dictations of his personal diary.[7] Mr. Nixon described his dictated diary as follows (App. 178):

> During various periods during my years as President I recorded dictabelts at the end of the day on which I expressed my own reflections, thoughts, ideas and concerns with regard to the activities and events of that day. I considered this dictation exceedingly private and would therefore express many thoughts and opinions which I would not have conveyed to any but my closest friends and some to none other than my personal secretary. At times I expressed my frustrations, my feelings of exhilaration, or other emotions experienced throughout the day....

The recordings also contain frequent conversations between Mr. Nixon and his wife and daughters concerning highly personal matters, candid discussions of his health with his physicians, and talks concerning innumerable private interests with his clergy and attorneys. These personal conversations are interspersed throughout the recordings, making it impossible to listen to any of the tapes without being continually exposed to intimate communications (App. 211-218). Even a single conversation often encompasses a wide variety of topics. As Mr. Nixon explained (App. 177):

> On occasion, for example, I would meet with a member of Congress whom I counted also as a close personal friend. During such a meeting we might discuss matters pending before Congress, political

[7] The materials seized by the Administrator also contain most of the actual unlabeled dictabelts of the former President's personal diary (App. 178).

> matters of interest to us both, or personal matters having to do with our families, our respective interests in business, or any other thing that was on our minds.

The district court minimized the significance of the Act's seizure of the former President's private conversations by stating that it had "no estimate by Mr. Nixon of what percentage of the conversations implicate Mr. Nixon's privacy rights" (J.S. App. 71a), and by assuming that "recordings made in the offices for use by the President must surely relate primarily to the conduct of the presidency" (*id.*). The district court was wrong in three respects. *First,* the tapes include conversations that took place in portions of Mr. Nixon's residences as well as in his offices. *Second,* although Mr. Nixon did not estimate the specific percentage of personal conversations on the tapes, he did inform the court that (App. 177) (emphasis added):

> The conversations I had in the Oval Office and in the Executive Office Building *frequently* included discussions of purely personal matters. . . . I had such conversations *nearly daily and often several times during the course of a day* with my wife, my daughters, personal friends, close staff members, and other persons.

Third, the district court implicitly concluded that any conversations not involving purely personal matters must relate "primarily to the conduct of the presidency" (J.S. App. 71a). What the court did not mention is that the recordings are replete with conversations involving purely partisan politics. As Mr. Nixon put it (App. 174) (emphasis added):

> [I]t was also my practice in my role as head of my political party to engage in *extensive and fre-*

> *quent discussions* with members of my staff, members of Congress, other officials of government, governors and state officials and personal friends and associates *concerning a multitude of political matters*. . . . Such discussions included, for example, whether I should support certain candidates for elected office and, if so, what form that support should take. In these discussions purely personal matters were often inextricably intermixed with political matters, and it would be virtually impossible to separate the various combinations of views and opinions expressed in them.

By categorizing a President's conversations as either purely personal or primarily related to the conduct of the Presidency, the district court transformed all political discussions—the largest category of conversations on the tapes—into official conversations. Freewheeling political discussions concerning, for example, whether to remove the incumbent Vice President from the Republican ticket in favor of another political figure, have become—under the district court's opinion—related to the conduct of the Presidency. Similarly, discussions concerning whether to support particular state officials in their campaigns for federal office—and all the personal data such political decisionmaking involves—are not, by the district court's standard, private.

In short, the two and a half years of Mr. Nixon's recorded conversations seized under the Act embody virtually every aspect of his daily life: from his late-night diary dictations of his private thoughts, to his legislative strategy sessions with his staff; from his counseling with family members, to his political brainstorming with party officials; from his social dialogue with close friends, to his phone calls of condolences to families of prisoners of war. Every attitude, emotion

and privately expressed thought, every unguarded personal reference, and every confidential exchange of ideas have been captured on the recordings. There is little wonder that journalists, authors, playwrights, and historians who stand ready to dissect, analyze and criticize every aspect of the former President's life would try so diligently to gain public exposure of such material, or that various Representatives and Senators would assist them in that effort. It is also little wonder that those who now defend the Act's constitutionality downplay this enormous intrusion upon the lives of Mr. Nixon and those with whom he spoke, by repeatedly emphasizing the millions of documents seized under the Act instead of the recordings. However, the constitutional claims presented here must be specifically analyzed in light of the fact that the recordings—seized separately under Section 101(a)—constitute material of extraordinary confidentiality and sensitivity.

2. *The documentary material*

Section 101(b) of the Act directs the seizure of all the other materials of Mr. Nixon's Presidency. Although the amount of such documentary material has been estimated at inflated figures as high as 42,000,000 pages, the figure is not so overwhelming when its components are viewed separately.

A major portion of the documentary material—some 7.3 million pages—consists of birthday, anniversary and special occasion greetings to Mr. Nixon and his family, children's letters, public opinion mail, and extra sets of GPO publications.[8] A second major component—

[8] The materials include, for example, several boxes of mail addressed to Mr. Nixon, received prior to August 9, 1974, which to this day have not been forwarded to him.

some 11.4 million pages—are files containing copies of various kinds of communications among the numerous executive departments. These are documents currently duplicated in the permanent files of the corresponding agencies.

The remaining materials are those which, in varying degrees, bear directly upon the internal operations of a President's office. They include, for example, the files of individual staff members, files of correspondence between Mr. Nixon and persons in both the private and government sectors to whom the former President looked for advice and recommendations, and Mr. and Mrs. Nixon's own files. Although the full panoply of items found among a President's materials defies detailed description and, indeed, will vary from one administration to the next, a general overview can be gained by a brief description of the internal operations of the President's office. Such a review itself helps to explain why, for two hundred years, departing Presidents have taken with them the papers they accumulated while in office and why that practice has not disrupted the ongoing affairs of government.

(a) *The White House Filing Systems*

First, the President's office is not an office of record. The originals of records of all actions by the President in his official role are preserved elsewhere, or are reflected in official publications of the government. For example, an enrolled bill signed by the President is maintained at the National Archives. Presidential vetoes or messages to Congress are lodged with the Clerk of the House and/or the Secretary of the Senate. Presidential pardons are filed with the Justice Department, and military commissions are recorded in the Department of Defense. In other words, every official action of the President is documented by materials permanently maintained by offices other than the White House (App. 201).

In addition, background documents relating to the President's functions are located in the permanent files of the various executive agencies. The originals of White House correspondence or memoranda to agencies or departments of the government are retained by those offices, and the copies of agency or department correspondence and memoranda to the White House similarly are filed permanently with the originating agency. Consequently, if a new administration needs, for example, to determine what action a prior President has taken with respect to imposing import quotas, the permanent files of the Commerce Department reflect it. What the new administration likely will not find in the Commerce Department's files are the various political options underlying the action, the discussions the President had with his own staff concerning those options, or his own analysis of the considerations he took into account in determining what course to follow.

Even within the Executive Office of the President —as distinguished from the President's own White House Office [9]—the files are retained from one administration to the next. Divisions within the Executive Office, such as the National Security Council, the Central Intelligence Agency, the Office of Economic Opportunity and the Office of Emergency Preparedness,

[9] With the creation of the Executive Office of the President in 1939, the "White House Office," which serves the President in the performance of the many activities incident to his immediate office, became a division of the umbrella Executive Office but remained, as it always has been, a separate entity with its own clerical staff, budget, files, *etc.*

maintain their own files, have their own budgets and staffs, and retain their files from one administration to the next. In some instances, such as the National Security Council, where the President sits as the functioning head of the office, the office maintains, in addition to its "institutional" files, a set of files specifically for the President. These presidential files are removed by the departing President at the end of his term. The institutional files are retained (App. 198-210, 398-403).

In sum, only the materials of the President's own White House Office are removed during transitions. It is only those files that historically have been subject to disposition in accordance with the desires of the President who accumulated them.[10] Thus, when a former

[10] The White House filing system has typically consisted of three segments: (1) the "Central Files", (2) files maintained by individual staff members in their respective offices, and (3) the personal files of the President maintained by his own secretaries. The Central Files, which is the main filing system, consists primarily of incoming correspondence processed by the White House mailroom and copies of outgoing correspondence reports, memoranda, etc., generated or received by the Office of the President and the various White House staff offices. Most of the incoming correspondence consists of letters to the President from private citizens; it also includes letters from state and federal officials, members of Congress, officials of foreign countries, and letters addressed to White House staff members other than the President. During the Nixon administration the Central Files were further subdivided to safeguard unwarranted access to confidential material (App. 403-406). A "Special Files" unit was created to house the following kinds of material:

(1) Investigative reports on individuals.
(2) Applications and recommendations for positions.
(3) Documents containing derogatory remarks concerning the character, loyalty, integrity, or ability of individuals.
(4) Documents concerning personal, family or financial affairs of individuals.
(5) Documents containing information which could be used to harass living persons or relatives of recently deceased persons.
(6) Information prejudicial to the national security.
(7) Information prejudicial to foreign relations.
(8) Communications addressed to the President in confidence, the immediate publication of which would result in discouraging confidential communications to a President in the future.
(9) Documents pertaining to the President's personal, family, business, and financial affairs.
(10) Security-classified information.
(11) Documents specifically restricted by the President.
(12) Politically sensitive information or documents.

President takes his papers and effects with him upon leaving office, the business of government is not disrupted. The permanent files of the various government agencies and departments are fully sufficient for the needs of the new administration to take up where the earlier administration left off or to strike out on its own with new policies and programs.

(b) *The Content Of The Documents*

When we turn our attention from the millions of greeting cards, publications and agency-duplicated documents to the more limited amounts of material truly central to this case, we find that the former President's files encompass the same spectrum of matters as the recordings seized under Section 101(a). The former President's own description of the materials he and his staff accumulated—which we refer to more specifically in our discussion of appellant's privacy and First Amendment rights (pp. 141-176, *infra,*)—highlights the scope of the materials. They range from such items as handwritten notes received from his daughters and correspondence with members of his law firm, to hundreds of political "briefing books" containing bio-

graphical backgrounds, personal vignettes, and other information for the former President's use in meetings with countless individuals. They also include handwritten drafts of his State of the Union messages and memoranda concerning positions to be taken on the veto of legislation.

The former President's description of the materials of his office deals mainly with those generated or retained by him or by persons with whom he worked closely. However, also among the documents a President's staff customarily accumulates are materials with which the President has less personal contact but which are nonetheless vital to the operations of his office. Here too, the variety is so large that a sampling can only scratch the surface. They include:

(1) The legal files of the President's Counsel.

(2) Republican political files and research reports.

(3) The files of the President's personal lawyer, James St. Clair.

(4) Memoranda to the President for his information, review, and decision including proposed decisions and instructions.

(5) Letters from citizens responding to requests for names of potential political appointees.

(6) Background files concerning proposed presidential appointees.

(7) Memoranda to the President on drug abuse.

(8) Constituent advice on campus unrest.

(9) Looseleaf notebooks containing replies to White House questionnaires.

We believe the best general description of the papers of a President was provided by the late Professor Herman Kahn in testimony before a House subcommittee.[11] Dr. Kahn stated:

> My own experience persuades me that much of the debate now going forward on this subject [of ownership of presidential papers] is of small value because the persons engaged in the debate have little reason to have knowledge of the true character of the Presidential papers they are talking about. . . . [I]t has been a part of our unwritten Constitution since the days of John Adams that the President of the United States is not only Chief Executive, Commander in Chief, and Chief of State, but is also a head of a political party. This is a fundamental requirement for the successful operation of our political system. But it is a corollary of that fact that at least 50 percent, probably more, of what we call the President's papers are political rather than governmental in character. I use the word political here not in any derogatory sense but in its truest and highest sense, as meaning public leadership, the successful functioning of party activities, and the marshalling of public and political support for the President's policies, programs, views, and the issues that he lays before the public. These are not records of governmental action. They are ancillary to and related to Government as all politics is related to Government, but they are not governmental records in the sense that they are records created by the President in the course of carrying out acts of Congress or otherwise acting in his formal constitutional capacity as Chief Executive or Commander in Chief. Because of the nature of his office, political matters inevitably are diffused through a very large part

[11] *Hearings on P.L. 93-526 Before the Subcomm. on Printing of the Comm. on House Administration,* 93d Cong., 2d Sess., 93-94 (1974).

> of what we call the papers of the President. . . . I am convinced it is the lack of understanding of this fact which has led many well-intentioned people to take the position that all of the President's files ought to be treated as official public records.

B. The Effect of the Act

We turn now to an examination of the terms of the challenged statute. The court below focused its attention on Section 104, which sets forth the standards relating to public access to the presidential materials. Summarizing the operative provisions of the Act, the court stated (J.S. App. 20a):

> The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104(a).

Since it believed the Act "merely" produced these limited consequences, the district court viewed the principal question before it as being (J.S. App. 28a)

> whether the process by which the materials will be reviewed and classified, leading to the imposition on various classes of them of whatever access restrictions are included in the regulations, is constitutional.

This limitation was erroneous because the Act has a much broader immediate impact on accessibility to presidential materials. Portions of the law other than Section 104 have severe constitutional consequences that must be weighed in any appraisal of the Act's validity.

1. *The definition of "presidential materials."*

Section 101 describes the materials that are subject to the provisions of the Act. The breadth of the statutory definition is immense. In addition to the tape recordings, the law directs the Administrator to "receive, retain, or make reasonable efforts to obtain complete possession and control" of any documents or objects "which constitute the Presidential historical materials of Richard M. Nixon." The Act then borrows the definition of "historical materials" in 44 U.S.C. 2101, which covers any item "having historical or commemorative value."

Quite obviously any paper or thing that has passed through the President's office at any time has "historical or commemorative value." Indeed, the court below acknowledged this fact when, responding to the argument that the statute was overbroad, it said: "Virtually any item might be needed by a historian, depending upon what subjects seem fit to study some years from now" (J.S. App. 62a).

Congress was not oblivious to the breathtaking scope of this seizure. In the course of floor debate on the Act, Senator Percy referred the Senate to a bill (S. 1926, 93d Cong., 2d Sess. (1974)) that had been introduced many months previously and that would have dealt in far more discriminating fashion with documents generated by or for a public official (such as a President) during his term in office.[12] The proposed bill was

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[12] The proposed bill's definitional section included the following (emphasis added):

> (2) "public documents" means, with respect to an elected official of the United States, the books, correspondence, documents, papers . . . and other objects or materials retained by an individual holding elective office under the United States and

ultimately offered as a floor amendment by Senator Griffin, who stated that it "would extend general principles involved in the bill before us to all Presidents, Vice Presidents, Senators and Congressmen." 120 Cong. Rec. 18245 (1974). Senator Ervin, successfully moving as floor manager to table the amendment, replied by saying (120 Cong. Rec. 18246 (1974)):

> If we attempt to put too much of a burden on one little nag that has to make a speedy journey we prevent the necessary speed being made, and it might break the back of the nag and I, therefore, move to table this amendment. . . .

For reasons specified in this brief, we believe that even a carefully tailored restriction—such as the proposed Griffin Amendment—upon a President's authority to dispose as he sees fit of the papers reflecting the "internal operations" of his office may violate the separation of powers principle. In this case, however, no such close question is presented. Congress' impoundment was not limited to documents "originated . . . in connection with the transaction of public business;" it covered every paper or thing "having historical or commemorative value."'

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which were prepared for or originated by such individual *in connection with the transaction of public business during the period when such individual held elective office and which would not have been prepared if that individual had not held such office.* The "elected official" would have reviewed his own material and deposited with a designated trustee those which he determined to be "public documents." The proposed law also provided that the official could demand an agreement barring specified "public documents" from "public access" for a period of up to 25 years "as may be necessary to protect confidentiality of communications or to save embarrassment to any individual."

2. How the materials will be processed.

The tape recordings of Mr. Nixon's conversations are described by the General Services Administration's March 1975 Report to Congress as "representing an estimated 5,000 hours of telephone and personal conversations." The GSA intends to make three duplicates of each of these tapes and to reduce to written transcript their full content—including those portions containing conversations that are entirely personal and private. The transcripts will then be subjected to revision and to review on several levels—after which new duplicate copies of the tapes will be produced. The GSA will permanently retain the complete original of all recordings, giving the former President a copy of the portions containing private conversations.[13]

The GSA Report contains two diagrams—reproduced on the following pages—which illustrate graphically the extent to which Mr. Nixon's personal conversations will be pored over by a GSA staff of lawyers, stenographers, and archivists, subjected to close scrutiny for transcription purposes, and ultimately preserved on several tapes that will be kept in the permanent custody of the GSA. Indeed, the second of the diagrams hypothesizes that the transcribers of a tape will spend more intensive effort on determining the precise words used by the speakers in "private or personal" taped conversations than in those conversations which are of a "general historical" interest. And the extent of the intrusion into highly confidential communications with presidential advisers is demonstrated by the "50:1" and "20:1" ratios contemplated for review of those discussions.

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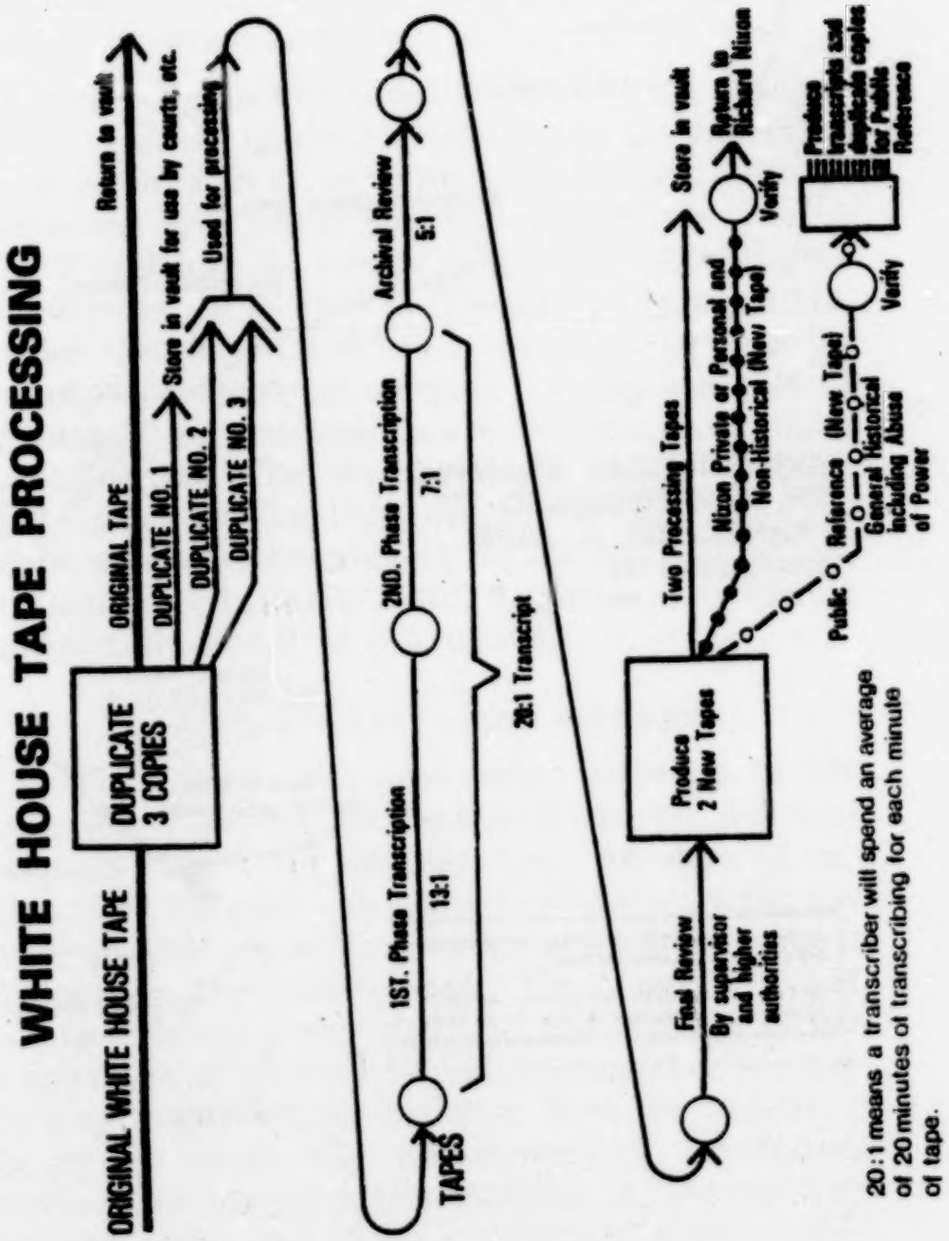
[13] GSA Report to Congress, March 1975 (pp. E-5, E-6).

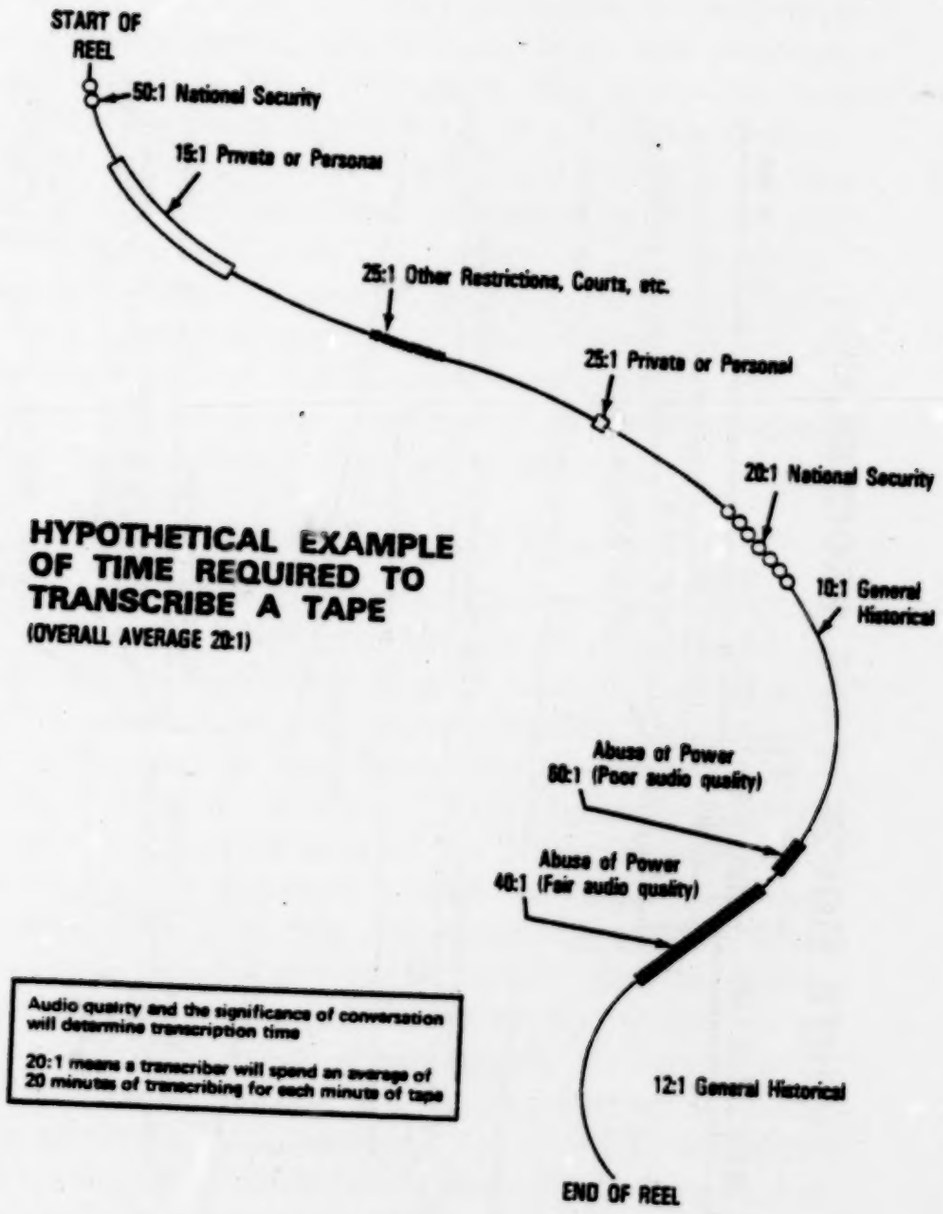
Congress could, of course, have acted with more precision in this area and have subjected to permanent government control and transcription only conversations related to the "Watergate affair" or only those directly involving the exercise of presidential duties. Had it done so, a serious separation of powers question would still have been presented in view of each President's right to be the "master in his own house." This law, however, goes far beyond limited intrusions resting upon legitimate public interests. Congress has impounded *all* of Mr. Nixon's conversations for permanent recording and analysis of even the most intimate conversations and sensitive discussions.

3. *Access by federal officials.*

The court below substantially ignored Section 102(d) of the Act, which has an immediate effect and which has given rise to regulations that are now in full force. It grants access to the impounded materials "at all times" to "any agency or department in the executive branch of the Federal Government." This places the most confidential communications of the Nixon Presidency at the disposal of executive branch personnel in succeeding administrations. The Act sets no standard for access other than "lawful government use," [14] and the regulations adopted by the Administrator apparently do not contemplate the denial of any request for access by executive branch officials. All the regulations require is that access be "documented" (41 C.F.FR. 105-63.206 (b)), and that classified documents not be seen by anyone having a lower security clearance than the highest

[14] The court below defined "lawful Government use" as meaning use that is constitutional—obviously an unexpressed element in every statutory provision (J. S. App. 26a-27a n. 18).





classification degree of the documents being examined (41 C.F.R. 105-63.206(c)). Moreover, the definitional provisions would grant automatic access to personnel of independent administrative agencies on the same basis as executive branch officials.

Again, Congress has moved too broadly, too precipitously and too thoughtlessly. Can there be any doubt that the prospect of an examination of confidential political discussions by a future administration would deter a candid exchange of views among those surrounding and advising an incumbent President? The seven factors set forth in Section 104(a) on which the court below relied so heavily as securing the confidentiality of presidential communications are limitations only upon "public access." They do not apply to executive branch access under Section 102(d), and it is clear from the Administrator's promulgated regulations that he will not supply voluntarily what Congress deliberately omitted from the text of Section 102.

4. *Availability to judicial subpoena.*

Section 102(b)—also given scant attention by the court below—directs that the recordings and historical materials "shall, immediately upon the date of enactment of this title, be made available . . . for use in any judicial proceeding or otherwise subject to court subpoena or other legal process." The "availability" of such materials is made "subject to any rights, defenses or privileges which the Federal Government or any person may invoke." It is not clear from the legislative history or from the Administrator's regulations whether this provision was *intended* to alter existing law and make Mr. Nixon's materials *more* readily available than those of any other President to subpoena

by private litigants. It is plain, however, that the enactment does, in fact, affect the availability of the materials to subpoena in significant respects. Mr. Nixon is no longer the custodian of these documents, and subpoenas may, therefore, be served on the Administrator. If the former President wishes to be heard on the question whether the subpoena should be executed or quashed, he is now in the role of intervenor and thus incurs additional procedural hurdles and loses various defenses which might otherwise apply. *Compare, e.g., Donaldson* v. *United States,* 400 U.S. 517 (1971); *Reisman* v. *Caplin,* 375 U.S. 40 (1964).

More serious, however, is the fact that the Act's seizure of the materials from a former President to facilitate their "availability" for judicial proceedings has been looked upon by various courts as freeing the materials from virtually any restraints based on confidentiality of presidential decisionmaking. The result has been that in a number of cases courts have ordered presidential materials to be made available to private litigants with gossamer-thin assertions of need to overcome the presidential privilege.

In *Sun Oil Co.* v. *United States,* 514 F.2d 1020 (Ct. Cl. 1975), for example, the plaintiff oil companies, complaining of an allegedly improper denial of a drilling platform permit, demanded access to four memoranda to President Nixon from his advisors. Notwithstanding this Court's unequivocal and repeated recognition of a "presumptive privilege" for such communications in *United States* v. *Nixon,* 418 U.S. 683 (1974), the Court of Claims held that the oil companies were entitled to the confidential memoranda because:

> These papers might well lead to the discovery of admissible evidence and are suggestively relevant to the subject matter of this action. 514 F.2d at 1025.

In another case the district judge, over a claim of presidential privilege, granted a demand by civil plaintiffs for discovery of *all* of President Nixon's conversations occurring over more than a one-month period that may have pertained to the May Day demonstrations of 1971. *Dellums* v. *Powell,* 70 F.R.D. 648 (D.D.C. 1976), *appeal pending* (D.C.Cir. No. 76-1336).

Most recently, a trial commissioner in the Court of Claims, over a claim of presidential privilege, ordered a government search of all of Mr. Nixon's presidential files in GSA's custody pertaining to the preparation of the budgets in each year of Mr. Nixon's Presidency so that various companies complaining of alleged breaches of their helium conservation contracts could learn the motivations and budget considerations which may have led to their terminations. *National Helium Corp.* v. *United States* (Ct. Cl. No. 158-75); *Cities Service Helex, Inc.* v. *United States* (Ct. Cl. No. 138-75), *appeal pending* (Ct. Cl. Nos. 158-75, 138-75).

5. *Mr. Nixon's access.*

Section 102(c) appears to provide appellant with access to his presidential materials, and the court below read the statutory provision as making them fully available, with a right, on his part, to reproduce them (J.S. App. 13a). In fact, however, the Act authorizes such access only "subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103." The Administrator's regulations (41 C.F.R. 105-63.206(b)) require the former President, on each occa-

sion when he wants to examine his materials, to state his "reason" for examining them, and a record is to be kept of all his activities during the period of the examination. Such requirements constitute a substantial inhibition upon his recourse to the materials. Similarly, the Act's directive to GSA to locate the materials in Washington, D.C., or its metropolitan area, creates an additional impediment to access since the materials will be sequestered some 3,000 miles from Mr. Nixon's home. Past Presidents were able to study and use their materials by depositing them in a facility or at an educational institution near their homes. Under the depository agreement Mr. Nixon intended to have his materials temporarily placed in a federal facility near his California residence (J.S. App. 134a-135a). The Act unnecessarily deprives him of this ready availability and makes his access contingent upon procedural obstacles that are unjustified.

6. *Conditions for public access.*

We have enumerated above many respects other than public access by which the law cuts deeply into a President's authority to deal with documents and objects relating to the "internal operation" of his office. These other provisions—which overbroadly restrict Mr. Nixon's rights and grant unjustified access to individuals and bodies other than the general public—would, even without the law's "public access" section, invalidate the Act. The court below, however, focused primarily on Section 104(a) of the Act which pertains to ultimate *public* access under regulations to be issued by the Administrator. Thus, we turn now to the "public access" provision which is, we believe, plainly unconstitutional.

The most glaring omission from Section 104(a) and the seven "factors" enumerated in that provision is Congress' total failure to recognize and direct the Administrator to implement the strong public interest in presidential confidentiality which this Court unanimously approved, and to which it granted constitutional stature in *United States* v. *Nixon*. Section 104(a)(3) speaks of "the need to prevent general access . . . to information relating to the Nation's security," but it does not direct the Administrator to take account of the need to protect "candid, objective and even blunt or harsh opinions in Presidential decisionmaking" by according confidentiality to "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." 418 U.S. at 708, 705. The "needs" of full disclosure of the "Watergate affair" and of historians' access to materials of "general historical significance" are affirmatively specified as desirable legislative objectives, but there is no countervailing "need" expressed by Congress to protect the confidences of presidential advisers or the details of the "internal operations" of the Presidency.

There are other omissions from Section 104(a) which the court below tried to cure by engrafting judicially constructed rules onto the statute. Section 104(a) imposes no limitation whatever on the procedures used in *screening* the materials. The Administrator, as previously noted (pp. 35-36, *supra*), intends to transcribe *all* portions of the White House tape recordings and subject *all* documents to equally intensive screening by archivists. The district court *suggested* to the Administrator (J.S. App. 21a n.13) various ways by which interferences with privacy might be minimized at the

screening stages (J.S. App. 29a-30a), but none of these procedures is guaranteed or even impliedly encouraged by the Act.

7. *Procedural protections.*

The Act provides no procedural protection for the former President other than the right ultimately to go to court. Operating in a vacuum, the Administrator drafted regulations which would entitle Mr. Nixon to submit challenges to decisions to release material for public access, but, as the court below noted, the regulations failed to provide that the former President would be notified of archival decisions to open particular materials, and no procedure was fixed to enable him to examine the material in order to decide whether a challenge should be made. The district court observed that without such a procedure, "either Mr. Nixon must have perfect recall of the materials, which is difficult to expect, or the risk must be run that he would be unable to assert his privacy rights before public access, in his view, had already violated them" (J.S. App. 30a-31a n.23). Accordingly, the district court *suggested* that "a workable arrangement . . . be devised" to grant Mr. Nixon these procedural rights.

The most troubling aspect of the absence in Section 104(a) of any reference to presidential confidentiality and to any procedures designed to secure that confidentiality is that these omissions operate to reverse the legal presumption of confidentiality. In *United States* v. *Nixon,* this Court said that there was a "presumptive privilege" covering presidential deliberations with the Chief Executive's advisers. Section 104(a) makes such conversations presumptively public, leaving former President Nixon the burden of persuading the Administrator, or ultimately a court, that a particular conversation should be shielded by the privilege. How likely is it that the constitutional confidentiality of presidential communications will be properly preserved if the former President has the burden of invoking and proving the privilege as to each of the thousands of otherwise privileged communications? The machinery contemplated by Congress and implemented by the Administrator make vindication of the right impossible.

C. The Immediacy of the Act's Impact

The district court prefaced its discussion of the constitutional issues with the explanation that it was treating only a "narrow" challenge—*i.e.,* whether the "regulatory scheme enacted by Congress [is] unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)" (J.S. App. 18a-19a). The court believed that Mr. Nixon's "objections to public access" might be eliminated by regulations which the Administrator could promulgate, such as "restrictions on access by the public, or by anyone other than executive officials for particular purposes, for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications" (J.S. App. 27a). It also thought that infringements on appellant's First and Fourth Amendment rights might be obviated by regulations "[p]roviding for the return to Mr. Nixon, pursuant to subsections 104(a)(5) and (7), of materials implicating his personal or political privacy rights" (J.S. App. 27a-28a). Hypothesizing such regulations, the district court concluded that "[w]hat remains before us, then, is the question whether the process by

which the materials will be reviewed and classified, leading to the imposition on various classes of them of whatever access restrictions are included in the regulations, is constitutional" (J.S. App. 28a).

The court below erred in concluding that the process of review and classification prior to opening the materials to public access is all that this case, at its present juncture, involves. As we have demonstrated above, sections of the Act that were substantially ignored by the district court have an immediate effect—all the materials are immediately sequestered, Mr. Nixon's access to them is burdened both by their physical removal and by individualized pre-access paperwork requirements, executive officials in future administrations are granted ready access to them, the burden of claiming and proving presidential privilege is shifted to the former President, access to private parties by subpoena is facilitated, and the Administrator is not obliged by any statutory directive whatever to take account of the policy of confidentiality in determining how to treat the materials while he is reviewing them or in drafting and issuing his "public access" regulations.

These immediate and direct consequences, separate and apart from the exhaustive review and screening process contemplated by the Act, violate the constitutional limitations growing out of the separation of powers principle, the Bill of Attainder Clause, and the First and Fourth Amendments. It blinks reality to say that Mr. Nixon and future Presidents will not have been harmed by the enactment of this legislation—except for the screening done by archivists—if the Administrator adopts regulations of the kind the district court imagined. Even if the Administrator were

to embargo *all* public access to materials of the Nixon Presidency until the former President's death and until the death of anyone involved in any way in any presidential communication and were to direct the prompt return to Mr. Nixon of all copies or portions of tapes and memoranda which, from a cursory examination, involve his First and Fourth Admendment rights, the various consequences enumerated above would still have taken effect. Is it constitutionally permissible for Congress to deprive a former President, against his will, of *all* papers and effects of his administration—even if public access to such items is then barred until his death? Is it constitutionally permissible to make such items available, against a President's will, to executive officials in future administrations? Is it constitutionally permissible to require a former President to shoulder the burden of establishing, at his own personal expense in multiple litigation throughout the country, that any presidential document which a private litigant wishes to reach by subpoena is subject to the constitutional rule of confidentiality established in *United States* v. *Nixon*? May Congress decide, as it has in this statute, that "the needs of historians, political scientists, and other scholars" to examine "the events of recent years and the workings of our government" override the "presumptive privilege for Presidential communications" which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution?" [15]

In *Laird* v. *Tatum*, 408 U.S. 1, 11-15 (1972), this Court distinguished between situations in which plain-

[15] The contrasting quotations are from H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. 3 (1974), and from *United States* v. *Nixon*, 418 U.S. 683, 708 (1974).

tiffs assert claims based upon "speculative apprehensiveness" that some official action might be taken in the future and those where plaintiffs' allegations relate to "specific present objective harm or a threat of specific future harm." The Court reaffirmed the principle of *Ex parte Levitt,* 302 U.S. 633, 634 (1937), that one challenging legislative action "must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . ." Mr. Nixon is obviously in that position with regard to many aspects of the Act other than the reviewing and screening that the law contemplates and that the district court considered to the exclusion of other consequences.

The legislative commands included in the Act have certain inevitable consequences which make these constitutional issues more analogous to those presented in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) and in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), than to *Watson* v. *Buck,* 313 U.S. 387 (1941), and *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1 (1961), on which the district court relied (J. S. App. 21a-22a). *Watson* v. *Buck* presented the question whether a federal court should enjoin, *in toto,* two Florida criminal statutes containing 42 separate sections, in apparent disregard of the state legislature's explicit severability clause. 313 U.S. at 395-96. The language quoted by the court below related to the possibility that several of the statutory provisions not explicitly considered might be constitutional on their face or as applied. Quite plainly, such a possibility is not at all similar to the remote prospect hypothesized here by the district court—*i.e.,* that the Administrator's regulations might retreat so substantially from what

the legislation anticipates that the constitutional claim might be weakened. Similarly, in the *Communist Party* case, this Court refused to decide whether the *statutory* sections of the Subversive Activities Control Act of 1950 which imposed disabilities on members of Communist-action organizations were constitutional in advance of any actual implementation of those statutory provisions. 367 U.S. at 77-79. It was not suggested in the *Communist Party* case, however, that a decision would be unripe simply because an administrative agency had not yet promulgated regulations, and that the regulations might conceivably alter the statute so substantially that its enforcement would no longer harm the plaintiffs.

In the *Regional Rail Reorganizatior Act Cases,* 419 U.S. 102, 142-144 (1974), this Court rejected the argument that a constitutional challenge to a statute is rendered premature by the fact that some arm of government has not yet taken the final step that deprives the plaintiff of his asserted constitutional right. After noting that "the exact terms of the conveyance" challenged by the plaintiffs "remain to be decided," but that "an order of the Special Court directing the conveyance is virtually a certainty," the Court said (419 U.S. at 143):

> Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. [Citations omitted.] "One does not have to await the consummation of threatened

injury to obtain preventive relief. If the injury is certainly impending that is enough."

The route taken by the court below is similar to that chosen by the Court of Appeals for the District of Columbia Circuit in *Buckley* v. *Valeo,* 519 F.2d 821 (1975), which was rejected when the case arrived here. The court had held, for example, that the constitutionality of the authority to be exercised by the proposed Federal Election Commission was not ripe for adjudication because the Commission had, *inter alia*, "enacted no rules" and had not instituted any proceedings or disqualified any candidate. 519 F.2d at 893. This Court decided that since rules and regulations had been issued by the time the case was decided here and since the Commission's other functions, while "yet unexercised," appeared to be "all but certain," a judicial decision was not premature. 424 U.S. at 115-17.

Under the rules of these cases, the various constitutional challenges we raise are fully ripe for decision on several grounds:

First, the challenges to the immediate consequences of the Act which we have previously described—those unrelated to "public access"—are not contingent in any way on future action or inaction by a federal agency. Hence they are ripe for decision under any conceivable test.

Second, even with respect to the "public access" provision of the Act, the two reports issued to date by the Administrator, together with his proposed regulations, demonstrate that it is "virtually a certainty" that the extraordinarily protective regulations conceived of by the court below are remote from the Administrator's mind. There is absolutely no suggestion

in the proposed regulations that there would be any time restriction on public access to confidential communications for the life of Mr. Nixon or anyone participating in or the subject of such communications (J. S. App. 26a-27a). And the detailed report on anticipated procedures—a matter which is not subject to congressional veto as are the regulations under Section 104—indicates, as we have previously noted, that there will be no actual "return to Mr. Nixon . . . of materials implicating his personal or political privacy rights" (*id.* at 27a-28a). Instead, he will be given a *copy* of tape recordings on which his most personal conversations appear, after they have been meticulously transcribed. The original tapes, along with several other copies, will be kept by the Administrator.

Third, the unconstitutional impact of a statute such as the one challenged here grows, in part, out of its "chilling" or "in terrorem" effect. For reasons discussed more fully below, the possibility that Congress could constitutionally enact another law such as this will inhibit future occupants of the presidential office and their close advisers. The constitutional question is, therefore, broader than simply whether Richard Nixon has been deprived of constitutional rights by a particular law implemented by particular regulations administered in a particular way. An equally important question is whether a law of this kind, vesting such authority in the Administrator, who is an appointee of the executive branch, so affects the Presidency that the Act should be invalidated on its face. When dealing with incursions by one branch of government into the authority of another, the courts should be guided by the principles analogous to those applied in cases involving free expression. In

this area, as with the First Amendment, litigants must be "permitted to challenge a statute not because their own rights . . . are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected [conduct]." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973). A law that overbroadly restricts liberties secured by the First Amendment cannot be saved merely by a provision enabling the agency administering it to cut back on the broad inhibitory effect of the express terms of the statute. *See, e.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 515-17 (1964). The likelihood that a President will alter the best way of doing business because he fears that Congress may enact a law in the future which will accord broad sequestration authority to an executive branch official is as harmful to the national interest as is the "chilling" effect on expression caused by an overbroad restraint on free speech.

Beyond the arguments made above, however, lies a practical consideration that demonstrates how unworkable is the approach taken by the district court. The court below leaves for later litigation a host of legal and constitutional challenges to various phases of the Administrator's implementation of this statute. If the opinion is carefully analyzed, the "reserved" questions expressly anticipated within its four corners come to a total of at least a dozen; and not all can be resolved at the same time.[16] Some involve administrative steps which will be taken before or after regulations under Section 104 are promulgated; others involve the language of the regulations; yet others concern the interpretation actually given to regulations.

[16] *E.g.*, J.S. App. 21a n.13, 26a n.18, 28a, 29a n.21, 30a n.23, 83a n.59, 84a n.60, 85a-86a, 87a, 89a n.64.

The upshot of leaving such questions unresolved is that Mr. Nixon is destined, under the district court's procedure, to a lifetime of litigation, at his personal expense, over the interstices of this hastily drafted piece of legislation. If the district court is correct in its conclusion that in advance of the Administrator's promulgation of regulations and actual administration of the law, all these legal issues are premature, the Act casts an excessive burden on the one individual who is subject to it—former President Nixon.

To be sure, there are regulatory statutes which assign great authority to administrative agencies or executive departments to implement broad statutory guidelines with specific regulations and policies. But in those situations the statutes apply to a large number of individuals or entities, and the burden of case-by-case litigation is divided among the entire group which is subject to the law. This statute deals with one individual—Richard Nixon. Whatever questions will be brought to court for judicial review as the Act is enforced will be brought by Mr. Nixon, and the burden of continuous litigation of this kind imposed on a former President is an additional inhibition on the free exchange of ideas among future Presidents and their advisers.

In concluding this discussion, we note that this fragmented piecemeal litigating approach which the district court suggested (and which the appellees have urged in their Motions To Affirm) is contrary to the position taken by some of the intervenor appellees when they submitted comments to Congress on the Admin-

istrator's proposed regulations. At that time, they advised Congress (emphasis added):[17]

> Mr. Nixon's constitutional claims are presently pending for decision in the courts .... The courts, rather than [the Administrator], should decide the questions of constitutional privilege. *The regulations need not, and should not, provide a mechanism for Mr. Nixon to assert these same arguments again after the legal challenges have been resolved in the courts.*

I

THE ACT VIOLATES THE SEPARATION OF POWERS PRINCIPLE BECAUSE IT ENCROACHES ON PRESIDENTIAL AUTHORITY TO CONTROL INTERNAL OPERATIONS OF THE PRESIDENTIAL OFFICE AND BREACHES PRESIDENTIAL CONFIDENTIALITY

The opening words of Article II of the Constitution declare: "The executive power shall be vested in a President of the United States of America." We submit, for reasons elaborated below, that the Act infringes upon presidential "executive power" because it removes from the former President, by legislative command, *all* discretionary authority over *all* material generated during the period of time that he occupied the Office of Chief Executive. Given the complexity in our day and age of managing that office, and given the President's obvious need for written or other memorialized forms of communication between himself and those who advise him, the authority exercised here

[17] Comments of the American Historical Association, The American Political Science Association, and The Reporters Committee for Freedom of the Press on the proposed regulations to implement P.L. 93-526 submitted to the Senate Committee on Government Operations and the House Subcommittee on Printing (pp. 8-9).

by Congress—to seize and subject to external scrutiny, even by individuals whom some describe as "trained and discreet," every piece of paper, every dictabelt and every reel of tape produced over the 5½ years of appellant's Presidency—constitutes an extraordinary invasion of the authority that has customarily accompanied the holding of that office or any other, be it public or private.

We need hardly emphasize to this Court how dependent contemporary society has become on the written or otherwise memorialized word.[18] The record in this case demonstrates the geometric progression of the volume of presidential papers from the time of Herbert Hoover to the present. The increasing complexity of the issues facing the President requires the preparation of written views and memoranda addressed to such issues. These memoranda deal, *inter alia,* with various approaches to problems which the President considers, the political implications of various resolutions of these issues, and the differing solutions offered by different members of the White House staff. The result is an amalgam of White House documents which outline and treat the issues confronted daily by the President.

The manner by which these issues are considered, weighed, resolved and acted upon is solely the responsibility of the President. He alone has the authority to direct the staff and determine how the critical issues of the day, domestic and foreign, will be handled by his

[18] We say "otherwise memorialized" to describe not merely the tape recordings which are involved in this particular case, but to include, as well, other conceivable forms of recordation that modern technology may devise.

office. The deliberations and decisions of that office are matters which the Constitution vests solely in the President. These are matters subject to control or restriction by neither of the other two branches. Absent the overriding but specific demands of law enforcement subpoenas, the courts and the Congress have no power to interfere with the internal conduct of the President's office.

Accordingly, the documents and deliberations (whether oral or written) of the presidential office are properly the concern of the President himself, and no one else. The process may neither be regulated nor intruded upon by the legislative or judicial branches. This process is the essence of the Presidency because it comprises the method by which presidential decisions are reached.

We submit that the separation of powers principle prohibits the blanket seizure accomplished here by Congress because it subjects the inner operations of the presidential office—in all its manifold details and with its necessarily uninhibited and confidential exchange of myriad views—to the microscopic scrutiny of future executive branch employees and, at the discretion of certain government officials, to the public spotlight. The constitutional draftsmen did not contemplate that presidential decisionmaking would occur in a goldfish bowl. It is each President's prerogative to decide whether his administration will throw all executive deliberation open in this manner. To do so, of course, would impair the free flow of communication among presidential aides and the President and would no doubt have its most serious impact in those particular areas where candid communication is most vital. In-

deed, Congress was aware, we believe, that if a procedure of this kind were directed to all Members of Congress, so as to seize and subject to an outsider's review all documents "having historical or commemorative value" upon a Congressman's departure from office, the practice would impair the legislative process. And we need hardly add that it would be destructive of this Court's procedures and established traditions if all the papers of any Justice upon leaving the Court were similarly reviewed by an outsider and then made public.

We begin our discussion of the separation of powers issue by analyzing why the constitutional principle shields the internal operations of a President's office from congressional action that could directly or indirectly impede the President's fulfillment of his Article II responsibilities. We then note this Court's recent approval of the general principle that deliberation in presidential decisionmaking deserves and constitutionally requires confidentiality. And we respond to the argument—made by the court below and by the intervenors, but now disclaimed by the Solicitor General—that if a *former* President seeks to preserve the confidentiality of his deliberations, his claim, as contrasted with an incumbent's, is entitled to little or no judicial recognition. Finally, we turn to a discussion of the tradition that has been followed by every President since the founding of this Nation, that has been sanctioned by both the Judiciary and Congress, and that underscores the separation of powers principle this Act infringes.

A. Legislative Restriction Of A Former President's Authority To Control And Dispose Of His Papers Encroaches Impermissibly Upon The Executive In Violation Of The Separation Of Powers Principle.

The essence of the separation of powers doctrine is that in this government of three equal branches, one branch, ". . . unless otherwise expressly provided or incidental to the powers [constitutionally] conferred," may not impinge upon the ability of another to carry out its constitutionally imposed responsibilities. *Springer* v. *Government of the Philippine Islands,* 277 U.S. 189, 201 (1928). This Court has expressed that constitutional tenet in various contexts. In *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), the Court pointed out that "the acts of each [branch] shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments." 289 U.S. at 530. And in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), the Court observed that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." 295 U.S. at 630.

Our espousal below of this Court's repeated admonitions that one branch may not intrude upon the ability of another to carry out its assigned functions was mistakenly characterized by the district court as an "archaic view of the separation of powers as requiring three airtight departments of government" (J.S. App. 34a). We most definitely do not argue here—and did not argue below—that the three branches of government must exist in "airtight" compartments that have no relation with one another. The Founders of this Nation had no such view of the separation of powers, as

No. 47 and No. 48 of the Federalist Papers plainly demonstrate. It was their intention, rather, to keep legislative, executive and judicial powers sufficiently independent "that none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers." The Federalist No. 48, at 321 (Mod. Lib. ed. 1937) (J. Madison). And it is instructive that James Madison, in assessing the potential for abuse of the separation principle, observed in the same paper (*Id.* at 323):

> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greatest facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.[19]

Unquestionably, there are areas in which the powers of the respective branches necessarily overlap. But there is within the sole domain of each branch those particular powers and prerogatives that are essential to the performance of its mandated functions. The most important is the right to deliberate, consider, and reach decisions in the manner that each branch individually

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[19] *See also* The Federalists No. 51, *supra* at 338 (A. Hamilton or J. Madison):

> In republican government the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislative into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided.

chooses. Conference memoranda of the Supreme Court drafts of congressional reports, and policy formulation briefs for the President all share the same character. Each is an intrinsic part of the internal management of the particular branch and relates to how its constitutional function is carried out. The head or heads of each department must be able to make individual choices on how to manage effectively the affairs of that office and to carry out the obligations assigned by the Constitution.

In the present Act, Congress has asserted the power to take from a particular Chief Executive the ultimate control over the materials of his office, thereby interfering with the President's management choice. It has legislatively mandated the terms under which presidential materials will be housed, reviewed, and potentially made public.

The influence upon the operations of the Presidency, both direct and indirect, that Congress could wield through the use or abuse of such power can be illustrated in several ways. One of the paramount duties of the President is to sign or veto bills passed by Congress. Given the number of bills enacted each year and the myriad subjects they encompass, the President must rely upon the assistance of others in deciding what action to take. This advice may be, and often is, gleaned from his staff, members of his Cabinet, Members of Congress, or even private citizens. And the substance of the information conveyed may reflect as many viewpoints as the number of persons whose counsel the President seeks. The President may be told that a particular bill is inflationary; that it reflects unsound economic policy; that it is the political pork barrel for a powerful Congressman; or that a veto will alienate

many of the President's political supporters. Some of this advice is received in confidence; some may be offered publicly.

In reaching his decision, it is the President who will determine from whom he will seek advice, what advice is relevant, what weight it should be accorded, and ultimately whether to sign or veto the bill. If the President vetoes the bill, he returns it to Congress. If Congress is dissatisfied, its recourse is to override the veto. It has no power to require the President to justify or further explain his action. That being the case, Congress cannot attempt to confiscate or make public the decisional memoranda or the private conversations underlying the President's decision to veto congressional action. Nor, as was apparently the district court's view, can Congress circumvent the separation of powers prohibition by legislatively directing a subordinate officer of the President to seize such material from the President and then decide, according to congressionally-imposed criteria, whether it should be made public. It is no more within Congress' power to have such work product made available to it or to the public than it is the President's right to have access to the memoranda prepared by the staff of the Member of Congress who introduced the bill originally, or the internal records of the committee that recommended the bill's passage to the full congressional body. Such communications are an integral and vital part of the functioning of the respective constitutional offices. If their sanctity can be breached by a coequal branch of our government in the broad-scale fashion reflected by the Act, then the content of that work product will reflect and be influenced by that fact.

Another responsibility and prerogative of the President is that of executive appointments and nominations for the Judiciary and administrative agencies. For the President to make a reasoned choice, he must have available candid, thorough, and critical evaluations of the abilities of each candidate.

The factors that go into the decisionmaking process for presidential appointments are inherently discretionary with the President. Indeed, the appointment process is the epitome of the President's political decisionmaking authority. *Washington* v. *Clark,* 84 F. Supp. 964, 966 (D.D.C. 1949), *aff'd* 182 F.2d 375 (1950), *aff'd* 341 U.S. 923 (1951). Neither of the other two governmental branches may interject itself into that process in such a way as to impede or influence the President's exercise of his discretion. This was recognized very early by the Supreme Court in Marbury's suit against Secretary of State Madison. *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1803). There the Court noted (5 U.S. (1 Cranch) at 165-166):

> To aid [the President] in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
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> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

When Madison was President, the Senate attempted to meet with him to discuss his nomination of an ambassador to Sweden. The President refused to have such a meeting, and in a letter dated July 6, 1813, he advised

the Senate that he deemed it his "duty to decline the proposed conference with the committee" on constitutional grounds. He based his refusal on the constitutional principle of separation of powers, stating his view (8 The Writings of James Madison, 250-51 (Hunt ed.))

> . . . that the Executive and Senate, in the cases of appointments to office and of treaties, are to be considered as independent of and co-ordinate with each other. If they agree, the appointments or treaties are made; if the Senate disagrees, they fail. If the Senate wish information previous to their final decision, the practice, keeping in view the constitutional relations of the Senate and the Executive, has been either to request the Executive to furnish it or to refer the subject to a committee of their body to communicate, either formally or informally, with the head of the proper department. The appointment of a committee of the Senate to confer immediately with the Executive himself appears to lose sight of the coordinate relation between the Executive and the Senate which the Constitution has established, and which ought therefore to be maintained.[20]

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[20] President Tyler took a similar view of Congress' right to learn about the Executive's internal consideration of appointments. In declining a request from the House of Representatives for information as to which members of the Twenty-sixth and Twenty-seventh Congresses had applied for offices, President Tyler stated:

> All appointments to office made by a President become, from the date of their nomination to the Senate, official acts which are matters of record and are at the proper time made known to the House of Representatives and to the country. But applications for office, or letters respecting appointments, or conversations had with individuals on such subjects are not official proceedings and are therefore beyond the right of the House of Representatives to hear and its duty to know.

J. Finley & J. Sanderson, The American Executive and Executive Methods, 219 (1908).

The rationale underlying a refusal by the President to discuss his proposed nomination with a Senate committee applies equally to the kind of disclosure forced by this Act. The Congress is not entitled, as part of its constitutional power, to inquire into the thought-processes that culminate in a presidential decision; a compulsory meeting between the President and a group of Senators would have precisely that effect. Similarly, if Congress were given access to a President's memoranda and papers, it would know *why* and *how* he has reached a particular executive decision. Those questions are of great political interest to Congress, but they do not fall legitimately within Congress' assigned constitutional role.

In *Myers* v. *United States,* 272 U.S. 52 (1926), this Court discussed various of the President's powers which were held to be exclusively within the competence of the Chief Executive. The same constitutional principles that led the Court to the conclusion it reached in *Myers* apply here (272 U.S. at 163-164):

> Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; . . . and, finally, that to hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.

The "executive power of the government . . . the general administrative control of those executing the laws" to which the Court referred in the *Myers* case must necessarily include the authority to control deliberations and access to information and to decide the form that the deliberative process will take—in short, to determine how decisions will be made and communicated. It also includes the right to determine who will be privy to the internal operations of the Presidency, and when and to whom its confidences and mode of desionmaking will be disclosed. Just as there is no need to have a specific clause in the Constitution that reserves to the President the exclusive power to appoint and remove his executive branch subordinates, there need be no specific reference to executive control over its deliberative process or the confidentiality of presidential documents to give a President sole authority over their control or disposition.[21]

This Court faced a parallel issue in *Powell* v. *McCormack,* 395 U.S. 486 (1969), where it was argued that the separation of powers doctrine (as well as the Speech and Debate Clause) barred judicial consideration of the House of Representatives' refusal to seat Congressman Powell. The Court recognized that, in the absence of constitutional claims, the "respect due a coordinate branch of government" would have required the judiciary to leave the question of House membership to the Congress itself. Since, however, the

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[21] The distinguished dissenters in *Myers* (Justices Brandeis and Holmes) would have sustained the statutory limitation on the presidential removal power because Congress is given constitutional authority to establish the executive offices at issue. That reasoning would not apply, however, to the subject of internal presidential materials, which do not require legislative authorization and are not subject to any legislative direction or control.

Congress had violated a constitutional limitation with respect to Congressman Powell by imposing a qualification on him in addition to those specified in Article I, Section 5 of the Constitution, judicial relief was appropriate. 395 U.S. at 548-550. The same principle that prohibits this Court from intruding into an internal organizational question relating to the House of Representatives forbids the Congress from interfering in details of the administration of the presidential office.

The historical circumstances of the legislation at issue here are strikingly similar to the circumstances under which the statute invalidated in *Myers* was enacted. Chief Justice Taft noted in *Myers* that the statute, the 1867 Tenure of Office Act, had been enacted because of "the serious political difference between the two houses of Congress and President Johnson." 272 U.S. at 164-165. He characterized the Act, which restricted the President's power to remove executive branch officers, as one which "exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm, and destroy the principle of executive responsibility, and separation of the powers fought for by the framers of our government. . . ." 272 U.S. at 167. He also repeated (*id.*) the observation of then Congressman James G. Blaine, which had been previously quoted in *Parsons* v. *United States,* 167 U.S. 324, 340 (1897):

> It was an extreme proposition—a new departure from the long-established usage of the federal government—and for that reason, and for no other, personally degrading to the incumbent of the presidential chair. It could only have grown out of abnormal excitement created by dissensions between the two great departments of the government. . . . The measure was resorted to as one of self-defense against the alleged aggressions and unrestrained power of the Executive Department.

The 1974 Act is similarly the product of "abnormal excitement."[22] The Court recognized that this "extreme" 1867 law would impair the Presidency if it were enforced. This Court, too, should appraise the 1974 law not by the passions of this period but by the long-term effects of the statute upon a President's ability to be master in his own house. The usurpation by Congress of the authority to control the operation of the President's office with respect to the handling of executive deliberations and the work product thereof is as potentially paralyzing to the President's ability to carry out his constitutional duties as the assault evidenced by the Tenure of Office Act invalidated by the Court in *Myers.* Indeed, if Congress has the power to force publication of the President's decisionmaking process concerning appointments, or even to reveal, after a President leaves office, the names of all persons he ever considered for judicial or executive appointment, it will inevitably impair the appointment process. Congress' influence on that process, albeit indirect, is as abhorrent to the separation of powers as the invalid Tenure of Office Act.

The conduct of foreign affairs, like appointment of executive officers and signing of legislation, is another responsibility entrusted under the Constitution to the

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[22] A comparison of the bill of attainder aspects of this law to those of the 1867 Tenure of Office Act demonstrate how much more "degrading" this law is. If, for example, the 1867 statute had been limited specifically to attempted removals by "President Andrew M. Johnson" as this law is limited to "former President Richard M. Nixon," could there have been any real doubt as to its unconstitutionality?

President. It is certainly open to question, for example, what impact this Act may have with respect to foreign leaders who conferred privately with President Nixon if their conversations are to be generally available within the executive branch and perhaps opened to the public. The uncertainty introduced by permitting Congress to set the terms by which presidential files will be handled can seriously impair the willingness of foreign statesmen to communicate freely with the President. The President must be in the position to assure them that he will protect their confidences.

So that our position is not misinterpreted, we emphasize that we do not contend that the Act—even if applied to all Presidents—would bring the Presidency to its knees. Certainly that would not have been the effect of the Tenure of Office Act either. But total frustration of a coordinate branch's functions is not the test by which to judge whether the separation of powers has been breached. The standard is whether that branch's legitimate sphere of operations has been trenched on in a way impairing its operations. The fact that a President and his staff can adjust their practices by not memorializing their deliberations or actions in order to circumvent such an act's impact or by destroying memoranda while the President is still in office cannot salvage the Act. The point is that a President and his aides may deem it preferable to record such information (as did Presidents Kennedy, Johnson and Nixon), in order to preserve it, but may feel constrained not to do so because of this Act. That is the vice of such legislation. That the encroachment by Congress upon the Presidency is indirect is beside the point. As this Court reflected in *Kilbourn* v. *Thompson,* 103 U.S. 168, 192 (1881):

> By reason, also, of [the Congress'] popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people, the great source of all power in this country, encroachments by that body on the domain of co-ordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power in any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separate from and independent of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny.

The full import of all we have said and the crux of the separation of powers violation we have raised is best summarized in the court of appeals' opinion in *Nixon* v. *Sirica,* 487 F.2d 700, 715 (D.C. Cir. 1974):

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch.

That is precisely what this statute entails—and what the separation of powers does not permit.

B. The Act Violates The Constitutional Privilege Recognized By This Court in *United States* v. *Nixon* To Protect Presidential Confidentiality.

We have discussed above our contention that the Act violates the separation of powers principle because of its impact *generally* on the internal operations of the President's office. In its broad sweep, the Act also confiscates confidential materials that this Court has already determined are presumptively privileged, an ef-

fect that constitutes an additional infirmity. In *United States* v. *Nixon,* 418 U.S. 683 (1974)—a decision rendered less than six months before this bill became law—this Court commented on the "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" (418 U.S. at 705 (1974)):

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

[*Id.*] This Court went on to recognize that the "confidentiality of Presidential communications in the exercise of Art. II powers . . . derive[s] from the supremacy of each branch within its own assigned area of constitutional duties" (*id.*). In this regard, said the Court, a claim of presidential confidentiality has "constitutional underpinnings." The Court amplified this constitutional principle by ruling that there is "a presumptive privilege for Presidential communications" that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708. In the context of *United States* v. *Nixon,* however, this Court concluded that the then-President's position, based on "a President's generalized interest in confidentiality" (418 U.S. at 711), had been rebutted by a uniquely powerful showing that the production of sixty-four specifically designated conversations was essential to "the fair administration of criminal justice." 418 U.S. at 713.

The President's "broad, undifferentiated claim of public interest in . . . confidentiality" (418 U.S. at 706) yielded to the compelling need for "evidence that is demonstrably relevant in a criminal trial" and which had been "preliminarily shown to have some bearing on the pending criminal cases." 418 U.S. at 712-13.

The present case is the reverse of *United States* v. *Nixon.* Here it is Congress that has asserted a "broad, undifferentiated claim of public interest" that seeks to sweep up *all* presidential papers, without discriminating between those specific items in which there is some overriding legitimate interest in disclosure—such as was shown in *United States* v. *Nixon*—and those to which the "presumptive privilege" most forcefully applies. By this enactment, Congress has withdrawn from the former President the authority to determine which, if any, of the materials of his office should be available to other executive departments in the current administration or possibly available to the public and which, if any, of his conversations with presidential advisers should be similarly accessible. In short, the Act reverses the presumptive privilege of confidentiality recognized in *United States* v. *Nixon* and places in a subordinate executive officer of successor administrations the power to intrude upon the confidentiality of a President's deliberations.

The district court justified the Act's impact upon the presidential privilege by three holdings, none of which finds support either in law or policy. *First,* it accorded "much less weight" to any assertion of the confidentiality privilege by a President in his materials the day he leaves office (J.S. App. 40a). *Second,* it held that the confidentiality privilege applies only to "communications" which "originate in confidence" pertain-

ing to "the discharge of presidential duties" (J.S. App. 41a). *Third,* having significantly narrowed the protective umbrella of confidentiality and accorded it lesser weight, the district court held that "[t]he intrusion on executive confidentiality that review by government archivists would constitute is, in our view, at most minimal" (J.S. App. 42a).

We respond to the district court's "much less weight" distinction between confidentiality claims of former and incumbent Presidents in the following next major section of this brief (pp. 81-90, *infra*). The second and third assertions are those to which we now turn. We believe that the court erred in its limited definition of the privilege, and we submit that the intrusion on executive confidentiality is particularly great because the Act reverses the presumption of privilege.

1. *The Scope of the Privilege*

An essential element of the district court's conclusion that the Act constitutes a minimal intrusion on presidential confidentiality was an interpretation of *United States* v. *Nixon* that does not square with either the language of this Court's opinion or the purposes the privilege is intended to serve. The district court read *United States* v. *Nixon* as limited to "communications" which "originate in a confidence," and which pertain to the "discharge of presidential duties" (J.S. App. 40a-41a). Indeed, the court even questioned whether such confidential communications are protected unless received directly by the President (J.S. App. 40a-41a n. 29). Such a limited definition excludes, *inter alia,* notes or memoranda made by the President for his own use, dictated recollections and observations,

and early drafts of speeches that he personally wrote. It excludes, as well, memoranda written by others without explicit assurances of confidentiality, documents that relate to political matters, and a host of papers that were not written for the President's own eyes but which formed the basis for recommendations or proposals refined or distilled by those who had direct access to the President. Each of these categories is, we believe, fully covered by the policy of confidentiality described in *United States* v. *Nixon* and deserves constitutional protection under the separation of powers doctrine. An atmosphere of assured confidentiality within the inner workings of the President's office could not prevail if he and his staff continually had to assess whether particular documents or conversations fall within the narrow legal confines described by the court below and thus deserve protection from compelled disclosure. Moreover, exclusion of subordinates' work product from the scope of the privilege would undermine the free flow of advice and exchange of ideas that must be garnered from all levels of the President's staff in order for him to perform effectively.

The district court's restriction of the privilege to communications in connection with official duties also disregards this Court's own description of the scope of the privilege. In *United States* v. *Nixon* the Court stated that "the need for confidentiality even as to *idle conversations* with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment." 418 U.S. at 715 (emphasis added). It is this broad umbrella of protection that accords with the necessities of the situation within the President's office.

What is at issue in assessing the need for the presumptive privilege is the confidentiality of the Presidency's internal operations—a subject that must be committed to the judgment of the particular Chief Executive ultimately responsible for that Presidency. In *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), Chief Justice Burger in a concurring opinion defined the scope of protection that would have to be afforded if efforts were made to invade the secrecy of this Court's processes:

> With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality *of its internal operations* by whatever judicial measures may be required. [403 U.S. at 752 n. 3 (emphasis added).]

The court of appeals in *Nixon* v. *Sirica*, 487 F.2d 700, 715 (D.C. Cir. 1974), similarly recognized that not only "communications" made in confidence are entitled to confidentiality, but that "wholesale public access to Executive *deliberations and documents* would cripple the Executive as a co-equal branch" (emphasis added). And in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 729-730 (D.C. Cir. 1974), the same court described the public interest as follows (emphasis added): "protection of *the presidential decision-making process* requires a promise that, as a general matter, its confidentiality would not be invaded . . ."

The district court, therefore, should have evaluated the Act not merely by whether it infringed on the confidentiality of "official" communications to a President from a presidential adviser, but by how it will affect the endless varieties of other materials generated by and around a working President. All such materials relate to the process contemplated by Article II of the Constitution, and Congress' interference with any substantial part of that process violates the privilege this Court has already sustained.

2. *The Act Intrudes Significantly Upon Presidential Confidentiality*

This Court could say with confidence in *United States* v. *Nixon* that presidential advisers would not "be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712. But the same prediction cannot sanguinely be made as to the consequences of the Act. Those who advised Richard Nixon while he was President doubtless assumed that oral advice they gave the President would be disclosed only at the instance of one of the parties to the conversation. Indeed, from the very beginning of Mr. Nixon's Presidency, he insisted that his advisers provide him their candid opinions and, in turn, assured them of his intention to keep them in confidence. As Mr. Nixon explained it (App. 531-32):

> [T]he most important prerequisite for good decision making is for a President to have before him all possible options, a wide range of options . . . [Arthur Burns] said in order to get that kind of advice, first . . . you must tell your Cabinet that, which I did at our first meeting. Second, you must

tell your staff that, which I did very early in our administration, telling them in effect that I was interested in their views, that I could not always assure them their views would be accepted but that I wanted them to present their views with all the bark off so that I could, in making up my own mind, have the full range of options in front of me.

I also did this in my relationships with people outside of government, they were quite aware of this, which had frankly been my practice long before I became President and one which I implemented in many instances quite successfully when I was President. People outside of government were willing to write in what they might consider to be unpopular views. . . . They did so . . . because individuals knew I could keep a confidence and, of course, I felt that they could as well.

In his affidavit he said (App. 172-173):

It was my practice to discuss with my aides, other officials of government, members of Congress, representatives of different organizations, and private citizens, their opinions on such matters as the preparation of legislation, the signing or vetoing of enrolled bills, and even the commencement, continuation or termination of military action . . . . I also found that such discussions permitted me to explore a complete range of thoughts, opinions and options. For example, I would be able to elicit from my aides, Cabinet members, Congressmen and Senators, and others their feelings concerning not only the wisdom of a particular course of action, but their blunt assessments of possible ramifications upon foreign or domestic policy, as well as potential political effects. I assumed that such opinions were given in confidence to assist me as President, and that they would not be publicly disclosed. Just as important, those who gave me their opinions must have so assumed. Otherwise,

their advice would have been less candid and less valuable, particularly if they thought that their advice would be rejected and they would be held accountable publicly for what later might appear to be erroneous or even stupid.

This position mirrored that expressed decades ago by President Eisenhower when information was sought relating to the Dixon-Yates controversy (*Public Papers of President Dwight D. Eisenhower 1955,* at p. 674 (1959) (emphasis added)):[23]

But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, *and if they are, will wreck the Government.* There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. *And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.*

The reels of recorded presidential conversations that are part of the material sequestered by this Act obviously contain verbatim accounts of countless "free, unprejudiced opinions" solicited by then-President

[23] *See also* 100 Cong. Rec. 6621 (1954) where President Eisenhower instructed the Secretary of Defense to forbid disclosure of executive branch "conversations or communications, or any documents or reproductions concerning such advice" because in his view, "it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters . . . ."

Nixon on a premise of confidentiality. Other materials covered by the Act, such as memoranda, notes, correspondence and miscellaneous documents relate to matters of domestic and foreign policy, as well as political assessments of presidential actions. In each instance, the author of the memorandum or document assumed that what he was writing would be seen by the President and kept secret unless the President (or someone acting on his authority) instructed otherwise.

Obviously, presidential advisers were aware when they expressed their opinions to Mr. Nixon that *he* might ultimately choose to disclose them—or that *they* might ultimately incorporate their opinions in published works. To this extent they yielded to the President's judgment, as that of their superior, to select the proper time for disclosure to other agencies in the executive branch or to the public, and they reserved their own options to disclose at some future date. The court below, therefore, relied on facts that were beside the point when it observed that "[p]residents and advisors are likely to write memoirs or to engage in public reminiscences disclosing communications that were once confidential" or that every President since Herbert Hoover has deposited presidential papers in presidential libraries (J.S. App. 42a-43a). These events do not derogate from the fundamental claim of confidentiality. Except to the extent that a President chooses to permit disclosure, his conversations with an adviser are expected to be kept confidential.

Under the Act, however, conversations and documents reflecting the thoughts and recommendations of advisers—some of whom are currently active in the political arena and others who someday intend to enter it—are entrusted to the hands of successor executive

officials of differing political views, motivations and philosophies. No matter how "professional and discreet" the district court may have viewed the hundreds of young archivists who will pore over such material, the fact remains that all presidential advisers must now wonder which confidences entrusted to a President will be honored and which ones breached. It is inevitable that future intervention by a third party, be it an official of the executive branch in a succeeding administration (given access to such materials under Section 102(d) of the Act) or a "trained and discreet archivist," will affect the scope and substance of the advice given a President. Regardless of the public position on the volatile issues in this case that the executive branch may have taken in the Ford administration or that it may now take in the Carter administration, this Court should not ignore the obvious "chilling" effect that the possibility of future third-party disclosure may have on those who serve the President today.[24]

The intervenor appellees have sought to undercut the confidentiality privilege by arguing below that presidential confidentiality is unimportant or undesirable. Relying upon the opinions of two former White House staff members and three newspaper columnists (App. 296), the intervenors contend that breaches of confidentiality by staff members and even by Presidents, both during and after a President's term in office, are so pervasive that there is no real expectation of confi-

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[24] Moreover, the constitutional principle of presidential confidentiality should not be lost forever merely because one President or two may disagree with it and choose not to assert it in litigation. The privilege exists for the benefit of the Presidency—and through the Presidency, for the benefit of the Republic—so that it cannot be waived forever by one President's inaction.

dentiality.[25] While it is a fact that "leaks" emanate from the White House for a variety of purposes, the conclusion that no confidentiality exists and thus no privilege need be afforded the President's communications is erroneous. As a matter of practice, those who advise the President may well assume that partial disclosure of their discussions will be made if the President believes disclosure is justified. And there are no doubt occasions when unauthorized disclosures of confidential matters do occur. But such instances do not significantly erode the expectation of confidentiality that is important to the flow of communications. And such instances are different, both in extent and in kind, from the massive, compulsory disclosures sanctioned by this Act.

Common experience teaches that despite the occasional voluntary disclosure of confidential information, even members of the public who communicate with a President on an issue before him assume that he cannot ever be compelled to disclose those communications. The practicing attorney who corresponds with the President concerning his opinion of a judge in his circuit whom the President is considering for appointment to an appellate court must assume that his letter will not be spread on the public record or even made available to a future Attorney General. Only then will he voice his critical evaluation of that judge's past performance. If the evaluation may become public, he

[25] The weight to be accorded these views must be judged against those of every President, from both political parties, who has held the office in the past 47 years. Each, in depositing his presidential materials in his library, has expressed the need to protect the confidences reposed in him during his term in office, and thus has reserved the right to limit access to such material. (App. 69, 79, 86, 92, 99).

must assess the impact of such release upon his professional career and will undoubtedly couch his views accordingly.[26]

The industry spokesman who candidly advises the President in private concerning his political views on school desegregation or environmental issues also assumes that he will not be called to account publicly for his private views unless the President makes his advice public. Otherwise, he too will temper his discussion, and the President will be cut off from a source of valuable and vital advice.[27]

A final indication that the infringement on presidential confidentiality is substantial is the Act's re-

[26] The fact that disclosure is made during the screening and review process only to employees of the executive branch does not eliminate or even reduce the effect on presidential confidentiality. The President may often wish to keep advice he is given by an assistant from others in the executive branch; a presidential adviser ordinarily assumes that his recommendation is for the President's consideration and not, in the absence of the President's deliberate transmittal, for the consumption of the entire executive branch. Being "master in one's own house" involves deciding which of one's subordinates should have access to particular information. Moreover, we note that in *United States* v. *Nixon* itself, the official seeking the information was the Special Prosecutor—an executive branch employee.

[27] Even more crucial are the areas of foreign policy and national defense. Justices Stewart and White commented on the obvious need for total secrecy as to these subjects in *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971):

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . [W]ithin our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

versal of the presumption under which presidential communications are privileged. The meaning of the "presumptive privilege" recognized by this Court in *United States* v. *Nixon* is that even a court may not assume the power to decide whether a presidential communication should be disclosed, absent a *prior* showing of a "demonstrated specific need for evidence in a pending criminal trial." The court of appeals, in a decision predating *United States* v. *Nixon,* recognized the same fundamental point. In *Senate Select Committee* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974), involving a congressional committee's attempt to force disclosure of far fewer presidential materials than those covered by this Act, the district judge had rejected Mr. Nixon's claim of privilege because, in his view, "the President's unwillingness to submit the tapes for the Court's *in camera ex parte* inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds." 498 F.2d at 728-729. The court of appeals held this action erroneous because the committee had not shown the subpoenaed materials to be "demonstrably critical" to the proper discharge of its constitutional functions (498 F.2d at 731), and because such a showing was necessary *prior* to any assumption by the district court of the power to order production for even *in camera* inspection.

Under this Act, the review of some 900 complete recordings by at least three levels of government employees (not merely by an individual judge) takes place without any prior showing of compelling need for particular items. And once the subordinate executive officer decides what items will be made public or disclosed to other government officials, the burden is

upon the former President to come forward and establish affirmatively the validity of a privilege of confidentiality. This reversal of the burden, together with the inroads the Act makes upon the assurance of confidentiality in general, renders the Act unconstitutional.

C. The Presumptively Privileged Status Of Presidential Deliberations Should Be Recognized Whether Claimed By A President While Still In Office Or Thereafter.

The private appellees in this case have argued both below and in this Court that the privilege of presidential confidentiality may be invoked only by an incumbent President, whether the disclosure sought relates to his own internal papers and conversations or to those of predecessors. (*See, e.g.,* Reporters Committee et al., Motion to Affirm, p. 21 n. 17.) The government took a more limited position in the district court, arguing that there is a difference in degree between the confidentiality rights of the incumbent and those of an individual who has left office (Brief for United States and Administrator of General Services, pp. 72-74):

> While we agree that there would be grave constitutional problems should Congress attempt to provide for access to the contemporaneous documents of an incumbent president (see *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 162 U.S. App. D.C. 183, 498 F.2d 725 (D.C. Cir., 1974)), in a constitutional sense the separation of powers doctrine operates in a different manner with respect to a former president. The presidency is, of course, a continuing institution, always occupied and functioning, always vested with the executive power under Article II of our Constitution. No one man is or can be the embodiment of that office. . . . A former presi-

> dent, of course, wields no Article II powers—he is a private citizen with no more and no less legal authority than any other private citizen. Without regard to questions as to whether a former president may claim presidential privilege to the documents of his administration, it is clear that the doctrine of separation of powers is fundamentally directed to the *contemporaneous* exercise of power by the coordinate branches of government . . . . In this context, Congress intended and the court must view the Act as preserving the materials of a former president rather than as an interference with the exercise of constitutional powers by an incumbent.

This position skirted that taken a few months earlier by the government—before passage of the Act it now defends—in litigation before the Court of Claims. There the government's position was unequivocal.

> [The government] has a strong institutional interest in the protection to be afforded Presidential materials once the President leaves office.
>
> *A former President may assert a privilege to protect the confidentiality of materials such as those at issue here . . . .*
>
> The rationale expressed in *United States* v. *Nixon* clearly is applicable after a change of administrations and in fact must be in order to be effective. Certainly a privilege which is "fundamental" to the operation of Government cannot disappear overnight. *The privilege and the right of the former President to assert it must continue. The frankness of communications protected by the privilege would be virtually useless if it disappeared as soon as a President* leaves office. (Footnotes omitted; emphasis added.)[28]

[28] "Statement of the United States Regarding the Assertion of Presidential Privilege for Documents of a Former President," filed in *Sun Oil Co.* v. *United States,* 514 F.2d 1020 (Ct.Cl. 1975).

The district court, without the benefit of the government's statement to the court in *Sun Oil,* concluded that the position taken by the private appellees—denying to a former President any right whatever to claim presidential confidentiality—"has much to commend it" (J.S. App. 37a). But the court found it unnecessary to go to that extreme. Evidently persuaded by the government's intermediate position, the court concluded (J.S. App. 40a):

> [E]ven assuming *arguendo* that Mr. Nixon may, as a former President, assert executive privilege, such a claim is not as forceful as one raised by an incumbent. All of the reasons militating against permitting a former President to assert privilege without the support of the incumbent suggest, at the least, that if he is to be allowed to do so, such a claim carries much less weight than a claim asserted by the incumbent himself.

The court below then said that because the former President's confidentiality assertion is, in this regard, "less forceful," and because it attaches, under the district court's erroneous view (see pp. 70-73, *supra*), only to communications sheathed in confidence and in the exercise of his official duties (J.S. App. 40a-41a), the intrusion of the Act on presidential confidentiality is "at most minimal" (*id.* at 42a).

Now that the case has reached this Court, the government has abandoned the position followed by the court below. In his Motion To Affirm, the Solicitor General states (Motion of the Federal Appellees To Affirm, pp. 18-19 n. 11):

> The district court expressed doubt (J.S. App. 39a-40a) whether a former President may assert a presidential privilege in litigation against pri-

> vate parties. We do not share this doubt; we believe that a former President's materials concerning the communications, submissions and deliberations essential to the conduct of his office are presumptively privileged. The privilege attaches to the documents themselves. It is for the benefit of the republic, the President, and his advisers alike, and it does not dissipate upon a change of Presidents or even the death of an ex-President. The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President, and a court should recognize a privilege of this sort even if no individual asserts it.

This strong endorsement of the importance of presidential privilege—the recognition that it is "for the benefit of the republic," and not, as the government had previously suggested, simply a matter concerning the "materials" of a man who is like "any other private citizen"—undercuts a fundamental premise of the decision below. If the constitutional privilege applies and should be judicially recognized as to internal presidential "communications, submissions and deliberations" even if the former President fails to assert it —or even if he is dead—there is surely no basis for distinguishing, in a constitutional analysis, between the claim of an incumbent and the claim of a former officeholder. We urge this Court to adopt the government's present position for it properly accords a former President the standing to resist compelled disclosure of his personal deliberations.

The district court's conclusion that a former President has less of a claim than an incumbent to preserve

the confidences reposed in him while in office is, we submit, erroneous on its face, and grows out of confusion by the court of two different kinds of "executive privilege" which are based on substantially different policies.[29] The district court cited and discussed cases concerning a privilege based upon ongoing government operations—*i.e.*, a claim that disclosure of records maintained by the executive branch would result in direct contemporaneous harm to the national interest. *United States* v. *Reynolds,* 345 U.S. 1 (1953) is the leading authority in this area. It recognizes "the privilege which protects military and state secrets." 345 U.S. at 7. That privilege, as the Court observed in *Reynolds,* "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Id.* The assertion of that privilege—described by the Court in *United States* v. *Nixon,* 418 U.S. 683, 706 (1974), as "a claim of need to protect military, diplomatic, or sensitive national security secrets"—is properly vested in the incumbent Chief Executive. That privilege in no way depends upon who authored the communication or to whom it was made; it exists to protect disclosure of *information,* and the decision as to whether disclosure of particular information—even information dating from a previous administration—would prejudice the Nation's interest at any particular time is one best made by the incumbent or his designee under law. No interest of the previous President is at stake in such a decision, unless

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[29] The district court refused to distinguish between "presidential privilege" and "executive privilege"—which it viewed as simply "semantic distinctions" (J. S. App. 35a-36a and n. 24). We believe that the two are founded on different policies justifying different results.

of course the documents also fall within the class of materials protected by presidential privilege.[30]

The presidential privilege that turns on the confidentiality of internal operations of a Presidency is entirely different.[31] The important factor there is not the impact of the information disclosed at any particular time, but the assurance to the President and his aides that their deliberations will not in the future be made public against the President's wishes. A successor has no appreciation for the assurances of confidentiality that a former officeholder imparted to those around him. The "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" (418 U.S. at 705) relates to *personal* relationships between a superior and those who work for him. It makes as much sense to have Mr. Nixon's successors in office decide which of the communications between the then-President and his advisers should remain confidential as it would to have a second husband decide which of his wife's conversations with her divorced first spouse should be subject to the marital privilege, or to have a substitute attorney determine which statements made by a client to the lawyer he first

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[30] Similarly, the interest in shielding high officials from burdensome responses to judicial subpoenas (J.S. App. 38a) may apply primarily to incumbents. Even here, however, former officeholders should be protected against vexatious and harassing demands once they leave public office in order not to "chill" prospective candidates for high government posts.

[31] In *Senate Select Committee* v. *Nixon*, 498 F.2d 725, 729 (D.C. Cir. 1974), the court of appeals called the presidential confidentiality privilege "*one species* of executive privilege" (emphasis added).

retained should remain secret, or to have a second priest decide which of a penitent's confessions to an earlier minister should be covered by the privilege.

Privileges designed to foster candor in relationships much less critical to the national interest than that between a President and his aides have been held not to terminate even upon the death of the party entitled to claim the privilege, unless waived by someone authorized to do so. *See, e.g., Massachusetts Mutual Life Ins. Co.* v. *Brei,* 311 F.2d 463, 469 (2d Cir. 1962) (physician-patient privilege); *Baldwin* v. *Commissioner of Internal Revenue,* 125 F.2d 812, 814 (9th Cir. 1942) (attorney-client privilege). To argue that an incumbent President's privilege ceases at the end of his term is as unjustified as the argument that the attorney-client privilege ceases at the termination of the attorney's representation of the client—a suggestion that has been flatly rejected by the courts. *United States* v. *Foster,* 309 F.2d 8, 15 (4th Cir. 1962).

The practical necessity of a former President being able to protect the confidentiality of his communications after leaving office was not lost on the district court (J.S. App. 39a-40a n. 28):

> The principal argument in favor of permitting a former President to retain authority to assert presidential privilege is that political partisanship might prevail over determination of the public interest were an incumbent administration alone to have the ability to assert privilege. Executive confidentiality would consequently be inadequately protected, and thus the ultimate purpose of the privilege—to encourage free and open communication by executive officials—would be undermined.

Having noted the argument, the court did not respond to it at all. We submit that no answer adequately addresses the problem. A subsequent administration may have little interest in protecting the confidentiality of the deliberations of former Presidents. Indeed, if the subsequent President is of a different political party, the interest may be precisely the opposite. And even if the incumbent believes revelations of a predecessor's deliberations are unwarranted, the political environment—such as that which exists with regard to former President Nixon's files—will most likely dictate whether an incumbent would feel free to invoke the privilege to prevent such disclosure. Put in its bluntest terms by way of illustration, assume that during the course of President Nixon's term in office he discussed with Republican congressional leaders their suggestions concerning pay increases for Members of Congress. Were we to accept the argument that Mr. Nixon can no longer assert any privilege to protect the confidentiality of those conversations, the decision as to whether they would be protected would rest upon whether or not the current Democratic President wished to have them publicly disclosed. Or, put in another context, would AFL-CIO President George Meany have spoken in confidence with President Johnson if he had felt that the confidentiality of his conversations would be left to the determinations of two successor Republican Presidents or their Administrators of GSA.?[32]

[32] The district court cited and discussed the Queens Bench decision of Lord Chief Justice Widgery in *Attorney General* v. *Jonathan Cape, Ltd.*, [1976] Q.B. 752 (1975), noting that the case was decided "in favor of publication." J.S. App. 42a-43a n. 30. In fact, however, much as was true in the parallel decision of this Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971),

The right of a former President to decide when and if his communications would be made public had never been challenged prior to the close of the Nixon administration, so far as we are aware.[33] The closest precedent was a subpoena issued by a Committee of the House of

the court ruled in favor of publication because it was not prepared to enjoin publication of the material at issue (which it viewed as "a Draconian remedy" (*id.* at 767)), and because on his own examination of the book that was to be published, the Lord Chief Justice concluded (*id.* at 771): "I cannot believe that the publication at this interval of anything in volume one would inhibit free discussion in the Cabinet of today. . . ." In arriving at this result, however, the court held "that when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court" (*id.* at 770) and that "the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence. . . ." (*id.* at 771). The British rule is, therefore, much closer to the principle suggested here by the Solicitor General—even if no President is available to assert the privilege it should apply. To be sure, the Lord Chief Justice did say that the confidentiality should lapse after a "limit in time," but it was never suggested that the incumbency of any Cabinet minister should affect the assertion of the privilege. And the time limit considered in the opinion ranged between 10 and 30 years.

[33] Only two judicial decisions have reached the issue to date. Judge Richey, in an opinion in the "consolidated cases" concluded that a former President could not assert a claim of privilege. *Nixon* v. *Sampson*, 389 F. Supp. 107 (D.D.C. 1975) (effectiveness of opinion and entry of order stayed); *see Nixon* v. *Richey*, 512 F.2d 427 (D.C. Cir. 1975). *Apton* v. *Wilson*, C.A. No. 798-72, and *Kuhn* v. *Wilson*, C.A. No. 956-71 (D.D.C. 1974) (consolidated cases) (Pratt, J.), held expressly to the contrary in granting the motion of former President Nixon to quash a subpoena *duces tecum* calling for the production of tape recordings, transcripts and documents reflecting or pertaining to certain presidential conversations.

The Court of Claims in *Sun Oil* v. *United States*, 514 F.2d 1020 (Ct. Cl. 1975), did not decide the issue. It assumed for purposes of its decision that a former President could assert the privilege, but concluded that, even if properly asserted, the documents in that case would be discoverable by civil litigants. *Id.* at 1025.

Representatives to former President Harry Truman in 1953, seeking his testimony on matters which occurred during his administration. Mr. Truman responded by letter stating in part (120 Cong. Rec. 17994 (daily ed. Oct. 2, 1974)):

> It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.
>
> The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

It strains credulity to assume that former President Truman, faced with a demand by a hostile Republican Congress to discuss his communications and actions in office, should have had to rely on President Eisenhower to assert a privilege of confidentiality on his behalf, or that President Truman's assertion on his own behalf was entitled to "much less weight." Our system has not operated in that fashion for two hundred years, and there is no sound legal or policy reason for changing it now.

D. The Unbroken Tradition of Presidents "Owning" The Materials They Accumulate While In Office Is Based Upon The Separation of Powers Principle.

We have referred previously to the fact that every President since the founding of this Nation has exercised the right to arrange for the preservation or disposition of the papers and effects he accumulated while in office. This indisputable fact is critical, for it underscores the separation of powers claim we assert here. The reason, of course, is that "constitutional power, when the text is doubtful, may be established by usage," *Inland Waterways* v. *Young,* 309 U.S. 517, 525 (1940), and "that in determining the meaning of a statute or the existence of power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 473 (1915).

In rejecting our separation of powers claim, the district court made no mention whatever of the 200-year-old practice followed by every constitutional office-holder to date. This was a significant omission, for as Justice Frankfurter explained in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610-11 (1952) (concurring):

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

The "deeply embedded traditional way of conducting government" at issue here has been engaged in by

every United States President from the inception of our government. It has been carried out openly and with the repeated recognition and approval of the other two branches and each President's successor in office. Accordingly, any assessment as to whether this tradition represents, as we believe, the tangible manifestation of the President's inherent power to control the internal affairs of his own office must afford proper weight to the "ownership" tradition.

1. *The Practice of All Constitutional Officeholders*

Few traditions followed by the three branches of our government are as deeply rooted and unvarying as the practice of each constitutional officeholder providing for the disposition of the materials of his office in the manner he or she deems most appropriate. From the beginning of the Republic, every President, Congressman and Supreme Court Justice has decided whether his papers should be placed in a library for research, published in literary works, destroyed, or disposed of in some other fashion. This tradition is so longstanding and of such independent importance that we have set forth in the Appendix at pages 421-442 a description of the past practices of fifteen Presidents, five Supreme Court Justices, and various Congressmen. The historical record demonstrates that each constitutional officeholder has, to the extent he desired, determined which of his papers he would take with him from office, protected the confidences reflected in them, preserved them for later use, or provided for their destruction.

The private appellees argue that the differing ways in which Presidents have disposed of their papers undercuts our reliance upon an unbroken tradition stemming from the origins of our Constitution. This ignores the point. The fact is that whether a particular President decided to (a) use his papers for literary endeavors (James Monroe, Exhibit H, p. v), (b) bequeath them to friends or relatives (George Washington, Exhibit C, p. vii; Thomas Jefferson, Exhibit F, p. 279; James Madison, Exhibit G, p. v; James Monroe, Exhibit H, p. vi; Martin Van Buren, Exhibit J; John Tyler, Exhibit M, p. v), (c) leave those papers he deemed appropriate with various departments of government (Theodore Roosevelt, Exhibit AA, p. v; William Howard Taft, Exhibit BB, p. vii), (d) destroy them (Franklin Pierce, Exhibit P, p. v; Chester A. Arthur, Exhibit W, p. 311; Calvin Coolidge, Exhibit EE, p. v),[34] or any combination of the above, it was invariably the outgoing President or those he trusted who determined the manner of disposition of his confidential materials.

A President's right to dispose of his papers and effects as he sees fit is similar in many respects, of course, to a person's right, under common law principles, to dispose of property he personally owns. Thus it is understandable that as each President took with him the materials he accumulated while in office the developing tradition was viewed in terms of common law property rights, rather than under principles of constitutional doctrine. Accordingly, it was quite natural for other incidents of common law ownership to be engrafted to the practice. Consequently, throughout the terms of Presidents spanning 200 years, presidential materials have been bequeathed to relatives, deeded

[34] All citations are to the stipulation and accompanying exhibits filed July 31, 1975.

to friends, donated to libraries, published as literary works, and sold to the government and private collectors. We believe that these additional incidents of ownership have been so firmly established by custom and usage that Mr. Nixon is entitled to enjoy the same property rights as did each of his predecessors in office. However, we do not contend that these additional incidents of ownership are constitutionally based. Only one—the right to control access to and disposition of the materials of his office—is rooted in the Constitution itself. Whether the others might be subjected to carefully drawn limitations not abridging other constitutionally protected rights is a question not presented here because, in this instance, Congress has passed a statute not affecting solely the incidents of common law ownership but one that cuts to the core of a constitutional officeholder's right to control the disposition of the materials of his office.

2. *Judicial Sanction of the Tradition*

The right of Presidents to dispose of the papers of their office, though viewed in common law ownership terms, has been repeatedly recognized and consented to by both the judicial and legislative branches of the government. As early as 1841, Mr. Justice Story, sitting on circuit, faced the question of a President's rights in the materials of his office. The case, *Folsom* v. *Marsh,* 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841), involved a copyright dispute in which the plaintiffs, who had acquired an exclusive copyright in the papers of George Washington, alleged infringement by the defendants' publication of a "Life of Washington." The papers in question consisted of both private correspondence and official letters and documents, a category which consisted of (9 F. Cas. at 344):

> Letters addressed by Washington, as commander-in-chief, to the president of congress. Official letters to governors of states and speakers of legislative bodies. Circular letters. General orders. Communications (official) addressed as president to his cabinet. Letter accepting the command of the army, on our expected war with France.

The defendants argued, *inter alia,* that (1) the papers were "designed by the author for public use" (*id.* at 345) and hence were not private property, and (2) the papers were "in their nature and character, either public or official letters, or private letters of business" (*id.*), and hence were not subject to copyright protection. Mr. Justice Story did not decide the copyright issue as to those documents classified as "official" correspondence, because the remainder of the papers were clearly subject to copyright and thus infringement was established. On the question of ownership of the papers, however, Mr. Justice Story's holding was unequivocal (*id.*):

> [I]t is most manifest, that President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington, through whom the late Mr. Chief Justice Marshall and Mr. Sparks acquired an interest therein; and, as appears from the contract between these gentlemen, annexed to the report, the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit. . . . The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington,

> as private and most valuable property. That President Washington, therefore, intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property, appears to me to be a proposition, completely disproved by the evidence.[35]

The disposition of President Roosevelt's materials gave rise to another judicial decision dealing with a former President's ownership of his papers—the decision of the Surrogate Court, Dutchess County, New York, in *In re Roosevelt's Will*, 73 N.Y.S.2d 821 (1947). That case involved the validity of the gift by which President Franklin D. Roosevelt deeded his presidential materials to the United States. The court held that the actions of Roosevelt with respect to the materials, which included the entirety of the "White House Central Files" still at the White House at the time of F.D.R.'s death, together with delivery and

[35] In his discussion of the copyright question. Mr. Justice Story suggested that, of Washington's presidential materials held by Mr. Folsom, there might be a distinction to be drawn in terms of the publication or non-publication of ". . . official letters, addressed to the government, or any of its departments, by public officers . . ." *Id.* at 347. Although Mr. Justice Story did not hold that there necessarily was such a distinction, it is clear that the distinction he posited was quite narrow. It did not purport to, and certainly could not, justify governmental intrusion for any purpose into *all* of the papers and effects of a President, particularly those of a confidential, political or personal nature, which is what the Act challenged here accomplishes.

In short, the qualification in *Folsom* v. *Marsh*, most broadly construed, supports only the conclusion that the Attorney General drew in his opinion (J.S. App. 129a):

> [T]here has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity.

acceptance by the Archivist, were sufficient to "pass title" to the materials.[36]

3. *Legislative Acceptance of the Tradition*

Congressional acceptance of a President's right to control the disposition of his papers and effects can

[36] In attempting to discount nearly 200 years of precedent, appellees rely heavily on *Public Affairs Associates, Inc.* v. *Rickover*, 177 F. Supp. 601 (D.D.C. 1959), *aff'd in part*, 284 F.2d 262 (1960), *reversed and remanded*, 369 U.S. 111 (1962), *on remand*, 268 F. Supp. 444 (D.D.C. 1967), in which the court ultimately held that Admiral Rickover owned a copyright in two speeches delivered by him while occupying government positions. That case—like the second question discussed by Mr. Justice Story in *Folsom* v. *Marsh*—did not involve the question of *ownership* of papers at all; it involved only whether Admiral Rickover had a private *copyright* in the content of certain of his speeches. No one in the *Rickover* litigation challenged the Admiral's ownership of the manuscript of his speeches or the materials gathered for use in preparing them. The reasoning of the court in *Rickover* would apply only if Mr. Nixon asserted a copyright in a public speech made while he was President. It is not, however, applicable to the question of the former President's ownership of his hand-written drafts or the original manuscript of any such addresses. It is nonetheless significant that the Court emphasized in its opinion discussing the elements important in determining the copyright claim, 369 U.S. at 113, the factor of "administrative practice"—a factor which, given the uniform historical tradition and practice under the Presidential Libraries Act, plainly establishes ownership by former Presidents of their presidential papers.

United States v. *First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), likewise affords no support for those challenging constitutional officeholders' ownership of their papers and effects. There the court of appeals affirmed the district court's finding that Captain William Clark's notes were not "an official work product of the Lewis and Clark Expedition," but were rather "made by [Captain Clark] for his personal use in subsequently preparing his own private diary. . . ." 251 F.2d at 688. The court distinguished the case of the notes of Captain Meriwether Lewis, commanding officer of the expedition, which had been kept by him and forwarded to the War Office in accordance with President Jefferson's explicit instructions.

be found as early as the nineteenth century when Congress appropriated funds to purchase portions of the papers of George Washington, Thomas Jefferson, James Madison, James Monroe, and Andrew Jackson. These affirmative actions by Congress, together with its acquiescence since the beginning of the Republic in the removal, disposal and occasional destruction of presidential materials by former Presidents, constitute powerful support for the principle that the papers relating to the conduct of the Presidency are the President's property. As this Court stated in *Myers* v. *United States*, 272 U.S. 52, 175 (1926):

> This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

Interestingly, Congress has not, by this legislation, changed the long-standing rule of law that Presidents and other constitutional officeholders own their papers. What it has done is to carve a retroactive exception to the rule for Richard Nixon. As recognized by the Senate Committee in its Report (S. Rep. No. 1181, 93d Cong. 2d Sess., 4-5 (1974):

> The legislation does not take any position with respect to the ownership of Mr. Nixon's tapes, papers and other materials. First of all, it is not clear that Congress can make a retroactive ruling as to whether these tapes and materials are or are not public property.

In 1955, Congress did consider fully the question of ownership when it debated the Presidential Libraries

Act, 44 U.S.C. 2107, 2108. The hearings on the Joint Resolutions which produced that legislation are replete with statements emphasizing that the presidential papers are the property of the former Presidents. Nowhere in the Hearings, the Committee Reports,[37] or the floor debate [38] on the 1955 Act was this principle challenged in the slightest. Indeed, that Act, which was designed to encourage voluntary donations of presidential materials and their acquisition by the United States, would have been wholly unnecessary had the papers been the property of the United States in the first place.

Congress has never retracted the approval it gave to the concept of presidential ownership in 1955.[39] The challenged legislation expressly ignores the issue, allowing the courts to determine, in light of the unbroken executive, congressional, and judicial recognition of the concept, who owns the papers of the Nixon administration.[40]

4. *The Practical Importance of the Tradition*

While judicial and congressional recognition of a right exercised by every Chief Executive provides a

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[37] S. Rep. No. 1189, 84th Cong. 1st Sess. (1955); H.R. Rep. No. 998, 84th Cong., 1st Sess. (1955).

[38] 101 Cong. Rec. 8834-38 (1955).

[39] Contemporaneous with Congress' consideration of the Act, the Congressional Research Service of the Library of Congress concluded that a President's ownership of his presidential materials is clearly established. Memorandum of the Library of Congress, Congressional Research Service, "Ownership of Presidential Papers," dated September 24, 1974. (Exhibit G, Pl's. Evid. Sub., filed June 30, 1975).

[40] S. Rep. No. 1181, 93d Cong., 2d Sess. 4-5 (1974).

strong basis for the separation of powers claim we present, the crucial element lies in the fact that the exercise of that right is necessary and appropriate to the functioning of the President's office. The reasons stem largely from practical considerations, some of which have been accurately noted by numerous students of presidential materials and by several Presidents themselves.[41] One such statement by a former administrative assistant to President Truman is particularly apropo:[42]

> [T]here are very sound reasons for the decision that presidential papers are the property of the President, as well as an unbroken line of precedents from Washington down through Truman.
>
> The Presidency is a constitutional office and as such has an independence like that of the other two branches of the Government.
>
> * * * * * * *
>
> This principle would, however, be overriden if after the end of a President's term in office his papers were assimilated to those of an executive department and subjected to the control of the succeeding administration and the legislative branch. Obviously, if presidential papers could be thrown open to public scrutiny as soon as a president left office, there would not be much privacy about them while he was in office. Few would write to a President in confidence, and few Presidents would put their private thoughts on paper if the

[41] See R. D. W. Conner *The Franklin D. Roosevelt Library.* Am. Archivist 3, 83 (1940) (quoting President Grover Cleveland); William Howard Taft, The President and His Powers 34 (New York: Columbia Univ. Press, 1967).

[42] David D. Lloyd, *The Harry S. Truman Library,* 18 Am. Archivist 99, 101-02 (1955).

> expiration of the presidential term were to be a signal for disclosure. And as a consequence the ability of the President to function as an independent officer of the Government would be curtailed, if not crippled, and our constitutional framework would be damaged.
>
> These, to me, are the fundamental constitutional and political reasons that justify the rule that our Presidents own their papers. And if we wish to mitigate the burden this imposes on ex-Presidents we should provide the sort of depository for their files over which they will have as much control as if they had personal possession.

The attempt by Congress here retroactively to deprive a President of the right to control the disposition of his papers and effects is singularly intrusive upon the separation of powers because the previously unbroken tradition has itself shaped the way Presidents record and preserve their thoughts and deliberations. Can it seriously be argued that if a President's diaries and dictated recollections are to be seized, reviewed and possibly made public upon the expiration of his term, he will feel free to record candidly his thoughts and preserve them in the White House? Is it likely that he will save, rather than destroy, the frank communications between himself and others about public personalities, or about political decisions? These memorializations—not to mention the recordings of conversation—were created and retained by Mr. Nixon and other prior Presidents on the assurance that the tradition of presidential ownership and control of disclosure was more than just a practice existing at the sufferance of Congress. We do not believe Congress can constitutionally change the practice, at least in the wholesale fashion effected by the present

Act, even as to future Presidents. But it is absolutely clear that with respect to *past* presidential documentation, Congress' power is circumscribed by the tradition that has become a vital part of the prerogatives of the President.

E. No "Public Interest" That Congress May Implement Over A President's Objection Justifies The Involuntary Seizure, Screening And Accessibility Of Presidential Materials.

While minimizing the "forcefulness" of the presidential privilege claim made by former Presidents and the gravity of the harm done to that privilege by an intrusion of the kind prescribed by this Act, the district court acknowledged that there was *some effect* on presidential confidentiality as a result of the law. It then balanced this effect against "important public interests" which it enumerated in some detail (J.S. App. 48a-61a). The district court's conclusion was "that the great importance of congressional purposes here far outweighs the need to prevent the very limited intrusion on whatever interest—if any—in presidential confidentiality Mr. Nixon may assert . . ." (J.S. App. 64a-65a.) We disagree, for reasons already stated, with the district court's diminution of the President's interests that militate against compelled sequestration, screening and disclosure of his materials. We turn our attention now to the interests the court said support the challenged Act. We maintain, first, that the "balancing test" employed by the court below is inapplicable to our separation of powers claim. We then note that, in any event, the cited interests—several of which appear really to be after-the-fact rationalizations devised to sustain a law that enacted in haste—simply do not justify what Congress has done.

1. The Impropriety of the "Balancing Test"

The district court assumed that the constitutionality of this law was to be determined by comparing the concerns Congress may have had in enacting the law with the objections that the appellant, as a former President, could assert to it. This mode of analysis is appropriate in many cases involving alleged violations of the First or Fourth Amendments. But it is simply inapposite where the issues concern the proper allocation of functions among the executive, legislative and judicial branches.

The most recent illustration of this point is found in this Court's separation of powers analysis in *Buckley* v. *Valeo,* 424 U.S. 1, 118-137 (1976). The issue there was whether Congress had encroached upon the Executive's constitutional authority under the Appointments Clause by providing in the 1974 amendments to the Federal Election Campaign Act for the creation of a Federal Election Commission, four of whose voting members were to be nominated by the President *pro-tempore* of the Senate and the Speaker of the House. A unanimous Court held that the vesting of the appointment power in the named Members of Congress was unconstitutional. None of the opinions even suggested that the relevant issue was whether the "interests" Congress was seeking to implement by conferring that power on its own members "outweighed" the President's "interests" in having exclusive control over the appointment of members of the Commission. Rather, the dispositive question was whether the legislative enactment was consistent with the powers that the Framers of the Constitution had intended to allocate and with the judicial decisions that had interpreted those powers.

There were, of course, "important public interests" to be served by distributing nominations to the Federal Election Commission among various branches of government. And conversely, it was surely open to argument that the impact on the President's appointment power would be "minimal" if these four federal officials exercising independent authority were named by Congressmen. But separation of powers issues are not decided by balancing the "interests" of one branch in encroachment and the "interests" of the other in resisting such invasion. If there is, in fact, encroachment by the Congress on a province that is exclusively the President's, or by the President into an area that is legislative, the overstepping of the line must be condemned.

Myers v. *United States,* 272 U.S. 52 (1926), and *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952) (the *"Steel Seizure Case"*), demonstrate how the principle works in the case of unauthorized action by either branch. There were certainly substantial policy interests that could have justified Congress' wish, in the Tenure of Office Act, to have a say in whether an executive branch officer would be dismissed. The intrusion into the President's authority seemed relatively slight; he still retained the sole power to *initiate* a dismissal, and all that he needed to carry one out was the approval of the Senate. Nonetheless, the Court did not "balance" these interests; it struck down the legislation as violative of the separation of powers doctrine.

Conversely, in the *Steel Seizure Case,* the public interests supporting President Truman's action were immense. The national defense in the midst of a war was jeopardized by the nationwide work stoppage

which President Truman sought to avert. He acted by seizing the Nation's steel mills and promptly requesting Congress to pass legislation, if it thought legislation appropriate. 343 U.S. at 675-677 (Vinson, J., dissenting). The record appeared to establish that a majority of Congress viewed the President's action as a "minimal" intrusion upon its constitutional power; Congress refused to act even though the President, in a formal communication stated: "The Congress can, if it wishes, reject the course of action I have followed in this matter." 343 U.S. at 677.

Application of a "balancing test" in the *Steel Seizure Case* would, we submit, have required this Court to sustain President Truman's seizure. But a majority of the Court decided, in a brief opinion, that Congress had "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department or Officer thereof.' " 343 U.S. at 588-589. The "lawmaking power" was said to be entrusted "to the Congress alone in both good and bad times," and the President's exercise of authority was, therefore, held unconstitutional. *Id.* at 589.

The present case is the first, to our knowledge, in which a court has held that an intrusion into an area reserved to one branch of government under the separation of powers principle may be justified by interests—not of constitutional dimension nor even essential to the performance of the other branch's duties—that supposedly "outweigh" the constitutionally protected interest. In *United States* v. *Nixon,* 418 U.S. 683 (1974), this Court did, to be sure, weigh a President's "generalized interest in confidentiality" against the constitutional demands of the Fifth and Sixth Amend-

ments, which express "our historic commitment to the rule of law." 418 U.S. at 708, 711-12. In other words, the Court in *Nixon* weighed interests that were central to the Executive's and Judiciary's respective roles under the Constitution (*i.e.*, the need for specific evidence for the administration of criminal justice, against the general promotion of candid advice in the executive decisionmaking process). In this case, neither of the two interests cited by the district court as seemingly sufficient to support the full sweep of the Act—historical preservation and access by executive officials—is central to the roles of the judicial or legislative branches. Absent the Act, neither branch would be impaired in its functions.[43] On the other hand, the Act's intrusion on presidential confidentiality is likely to be great, and the breadth of disclosure—at least for sequestration and screening purposes—is all-encompassing. Accordingly, balancing is improper here.

It is only when "interests" central to the constitutionally allocated responsibilities of the several branches come into direct conflict that the court must choose one or the other. For example, in *United States* v. *AT&T*, No. 76-1372 (D.C. Cir., December 30, 1976), the court of appeals faced just such a confrontation between the legislature's right to subpoena items needed to perform its oversight responsibilities and the President's right to preclude disclosure of information detrimental to the national security. The court was extremely reluctant to begin "balancing" even as

[43] To the extent that the subordinate interest—availability of evidence in civil and criminal trials and access to the materials by Congress for purposes of legislative reform—speak to the operations of the other branches, their needs may be accommodated by a less intrusive alternative. (See discussion *infra*, 121-130.)

to interests supporting the constitutional responsibilities of the respective branches and avoided doing so by resubmitting the question to the parties for further negotiation (*id.* at 25). The obvious difficulties the court of appeals saw illustrate the impropriety of "balancing," especially where one branch's action to promote some "public interest"—legitimate as it might otherwise be—is at the expense of intruding upon another branch's area of constitutional responsibility.

In addition, balancing is inappropriate where, as here, the "interests" being promoted to justify a breach of the separation of powers is not unique to the branch seeking to exercise power over the other. Assuming, *arguendo,* that balancing were proper here, the interests enumerated by the district court do not relate to the question of *which* branch of government should act. As the district court noted, "The simplest way of describing the public interests served by the Act is to merge all of them under the rubric of preservation of an accurate and complete historical record (J.S. App. 48a-49a). We agree, of course, that Congress has a legitimate general interest in preserving an accurate history of this country, but the interest in historical preservation—particularly as applied to presidential materials—is shared by the executive branch.[44] To disqualify a former President because of his self-interest and the natural wish that history treat him kindly would require disqualification of a Senator or Representative with regard to his materials, or a Justice of this Court who is deciding whether to deposit his papers in an appropriate library or to destroy them. Does

[44] In fact, Mr. Nixon's purpose under the depository agreement was precisely to make the vast majority of his materials available "for research and study." (J.S. App. 134a).

the interest of "preservation of an accurate and complete historical record" mean that a President may direct the sequestration and screening by the Librarian of Congress of all a Senate Minority Leader's documents or that he may order a United States Marshal to seize and review all of a Chief Justice's papers?

2. *The Preservation of Historical Materials*

The district court asserted that "the Act serves the national interest by preserving materials upon which historians must draw in order accurately to recount and to judge the political history of our time" (J.S. App. 49a). The terms in which the court below describes this "national interest" makes this proposition appear as indisputable as motherhood and allegiance to the flag. In fact, the preservation of *all* materials relating to the internal operations of a high government office for historical scrutiny is a subject over which there is continuing debate.

There is a substantial body of opinion that too much internal data is being made available to historians and being publicly disseminated. Books by intimates of President Eisenhower, such as Emmet John Hughes' The Ordeal of Power (1963) and Robert J. Donovan's Eisenhower: The Inside Story (1956), aroused strong feeling that presidential confidences were being violated. See Sickels, Presidential Transactions, 54 (Prentice Hall 1974); Schlesinger, The Imperial Presidency 370 (Houghton Mifflin 1973). The same reaction followed publications by close associates of President Lyndon B. Johnson—George Reedy's The Twilight of the Presidency (1970) and Eric Goldman's The Tragedy of Lyndon Johnson (1969). Arthur Schlesinger, Jr. reports that, as a result of Donovan's

revelations, "the keeping of cabinet minutes came to an end." Schlesinger, *supra* at 370.

Possibly the most public dispute on the desirability of the type of disclosure advocated by the court below was the one which surrounded the publication of Professor Alpheus Thomas Mason's biography of Chief Justice Harlan Fiske Stone (Harlan Fiske Stone: Pillar of the Law (Viking 1956)). As Mason indicated in his acknowledgement, he received "unrestricted access" from the Chief Justice's widow to all of "his personal correspondence, private and public papers." As a result, the book contained many disclosures about internal operations and decisionmaking that were of legitimate historical interest, but that were viewed by many scholars of this Court as damaging to its processes. One well-known reviewer said:[45]

> One result is the release of a great quantity of material which had hitherto been regarded as secret. This may prove regrettable, because justices will scarcely be able to carry on their most confidential business with the same freedom as before if they suppose that their every move is being recorded for the biographers. Here even the most confidential of all matters, the conference itself, is exposed by occasional notes concerning conferences dictated by Stone upon his return to his office. On the other hand, the justices' loss will now be the historians' gain, because other justices will undoubtedly make available similar materials for the past.

The prediction was not quite accurate. The late Justices Black and Harlan did not "make available simi-

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[45] John P. Frank, *Harlan Fiske Stone: An Estimate*, 9 Stan. L. Rev., 621, 631 (1957).

lar materials." They believed that the historians' interest was outweighed by the Court's interest in total and permanent confidentiality. Accordingly, they burned their internal Court papers before they died. *See* Black, My Father: A Remembrance (1975). This followed the precedent set by Justices such as Wayne, Miller, Lurton, Peckham, E. D. White, McKenna, Cardozo and Jackson. Manuscript Division, Library of Congress, *Location of the Personal Papers of Justices of the U.S. Supreme Court,* Case File Memorandum (1956); Westin, Book Review, 66 Yale L.J. 462, 468 (1957).

Another reviewer doubted that Mason's disclosures were wise because they raised the question: "[w]ill Justices in the future exchange their ideas, in writing, as freely and unreservedly as they should; or will they find themselves, in writing to each other, addressing some future generation of popular readers?" [46] And another reviewer observed, "The question arises, however, whether some of Mason's disclosures had not better been withheld." [47] Yet another reviewer was not so kind: [48]

> It would seem to me that for an evaluation and understanding of Supreme Court decisions and opinions the publication of these materials serves no useful purpose. In deciding whether *X* v. *Y* is a good or bad decision, or whether the opinion enunciates a good or bad principle, or whether the

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[46] Westwood, Book Review, 43 Va. L. Rev. 297, 301 (1957).

[47] Harris, Book Review, 43 Iowa L. Rev. 456, 457 (1958).

[48] Dunham, Book Review, 24 U. Chi. L. Rev. 794, 797 (1957).

rule it establishes is likely or unlikely to survive, it does not help us to know that the Court did not even discuss the issues written about in the opinion or that the opinion was modified to accommodate views of colleagues on the Court or sensibilities of co-ordinate departments, or that a judge thought the approach or conclusion finally adopted by his colleague was suggested by a law clerk. Unlike most decision-makers in and out of government, judges by convention are required to state publicly reasons for conclusions reached, and these stated reasons influence, or fail to influence, the law and other judges. There is no contribution to advancement of knowledge in this area by reason of publication of these letters.

It is possible that such material may give insight into the judge's conception of his role or roles as judge, and that from such material we can discern and evaluate the possible roles a judge may play. Mason has not organized the material for this purpose, nor does he draw much in the way of conclusions from it, although he has limited himself in part by his selection of cases and in much larger part by an attempt to tell a story about the cases used. Mason, in making use of these materials, has not helped to disclose Stone's concept of his judicial role in making decisions. Absent this use, or publication for literary value, disclosure of such memoranda and letters is more than indiscreet; it is useless.

> Unless these memoranda and letters contribute to an understanding of the decision-making process, there is very little excuse for publication. They may not be tittle-tattle but they are used as such.

A leading scholar of the Court, Professor Alan F. Westin, took an intermediate ground, and concluded that "[a] time restriction on judicial papers . . . is both

wise and proper.'"[49] His ultimate judgment, however, is particularly important for this case (*id.*):

> Clearly, the primary responsibility in disclosing judicial papers rests on the Justice himself.

It is undesirable and inappropriate for Congress to replace the judgment of "the Justice himself" with its own evaluation as to whether the historian's need overrides the Court's. It is equally inappropriate for Congress to make this judgment in place of the President, who is in a far better position to weigh the impact of disclosure than Congress or the Administrator of GSA and who is more capable of evaluating the Presidency's interest in confidentiality than archivists who have the public disclosure bias of historians.

While it may be true, therefore, that Congress wishes to preserve materials useful for "political history of our time," it was not Congress' province to decide that this "interest" outweighs the President's interest in confidentiality. That judgment is not so universal or so "integral to a society based on democratic principles" (J. S. App. 51a-52a) that it is entitled to unquestioning adherence. We might suggest, with some deference, that if Congress believes the historians' interest so clearly outweighs the benefits of confidentiality in decisionmaking, it should begin to implement that decision in its *own* realm by enacting such legislation with respect to congressional records, and not take the first experimental step with the papers of the head of the executive branch.

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[49] Westin, Book Review, 66 Yale L.J. 462, 469 (1957). Compare the view of Lord Chief Justice Widgery discussed at note 32, *supra*.

3. Availability for Successive Administrations

The second interest that the district court believed to be "of special importance" (J.S. App. 49a, 52a) was for the government to have "continued access to documents of the outgoing administration" (*id.* at 53a). The court relied on the fact that there were "numerous examples in the record of incumbent administrations having to apply to presidential libraries for permission to examine records of past government actions that relate to current government problems," and, the court said, "Congress could legitimately believe it important to legislate, as it did, to ensure that this need is served by a regularized and certain procedure" (J.S. App. 54a-55a, 56a-57a).

The fact is that Congress had absolutely no basis for such a belief. Not one government official testified before a single congressional committee concerning any need to assure future administrations of ready access to the files of Mr. Nixon's administration. Moreover, the government's effort during the course of this litigation to unearth instances demonstrating such a need in past administrations has produced a record documenting that such a need has been extraordinarily rare during the 200-year history of this country.[50]

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[50] One of the few instances in which an incumbent administration has sought access to the files of a former President occurred in the early 1960's when a request was made by staff members of President Kennedy to former President Eisenhower for a copy of the 1956 telegram concerning the Suez crisis from Ambassador Douglas Dillon to the State Department. The court below viewed this as a remarkable situation, illustrating the need for Congress to step into the breach to assure that future administrations would have access to Mr. Nixon's files. J.S. App. 55a-56a & n. 42. The district court,

With regard to this interest of ongoing government business, two questions that spring immediately to mind are (1) why, if "regularization" was Congress' purpose, did Congress choose to limit its directive to the papers of former President Nixon and not reach future Presidents such as President Ford, who, under the terms of deposit of his presidential materials with the government, will make the decision as to what material he considers personal and thus outside the scope of his agreement, and (2) by what right may Congress "regularize" the transition of records from one President to another, when this is more properly a subject for arrangement between the two Chief Executives. In fact, one of the objectives of the depository agreement of September 6, 1974, was to provide a mechanism whereby any necessary papers would be made available to President Ford and the agreement apparently satisfied the interests of Mr. Nixon's successor.[51] It

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however, described the situation divorced of the political environment of the time. The request to President Eisenhower followed on the heels of several attacks by the Kennedy administration upon President Eisenhower for his handling of the Suez crisis, which precipitated the Dillon telegram. President Eisenhower, cognizant of those attacks, took the position that if the information sought was truly for national security purposes, and not for partisan political reasons, the request should be made by the then incumbent or the Secretary of Defense (*See* App. 195-97). What this incident demonstrates is that there can be an occasion in which national security interests and partisan political concerns intersect and which, therefore, create the potential for isolated disputes between Chief Executives. However, such an incident in no way justifies the seizure of massive amounts of a President's political files, which could in no way relate to the ongoing affairs of government.

[51] The district court rejected President Ford's acceptance of the agreement by saying, "We do not believe that approval of a brand

seems entirely clear from the legislative history that this interest in "availability of documents" is an after-the-fact rationalization, not remotely contemplated by a single Senator or Representative who voted on the measure.

More fundamental, however, than the surface objections to this justification are the real facts that underlie it. Access to papers needed for ongoing governmental purposes has not been a serious or recurring problem in the past. Changed policies implemented by Mr. Nixon while he was President substantially reduced the possibility of isolated occurrences of this kind, and the papers which are at issue in this case are not the kind that present this problem. Moreover, specific instructions were given at the time of the transition to all White House staff members to retain copies of any items they might need for future use (App. 402). Indeed, the *only* evidence submitted by the government during this litigation to sustain the "government access" justification pertains exclusively to one distinct portion of Mr. Nixon's files maintained for him by the National Security Council, hardly compelling enough to support a statute seizing millions of documents as to which no evidence has ever been adduced demonstrating a continuing need for

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new Chief Executive of an agreement negotiated in some haste and, as plaintiff himself notes . . . in a time of some turbulence, necessarily represents the considered judgment of the Executive branch, especially since such a contention is to some extent inconsistent with President Ford's having signed the Act." J.S. App. 57a n. 43. In fact, this law was enacted "in some haste and . . . in a time of turbulence," and President Ford's signature upon it is no more of a "considered judgment" than was his approval of the depository agreement.

access.[52] Nonetheless, the appellees asserted below that if Congress had not acted to deprive Mr. Nixon of his presidential materials, his control over those materials would cripple the business of government. But the government and the private appellees are well aware—as was Congress—that *every* former President has at the end of his service immediately cleared the White House of the entirety of the materials of his administration, and that only on very rare occasions has the succeeding administration felt a need for *any* access to those materials. In light of this fact, one is hard put to explain how Mr. Nixon's control over the overwhelming majority of the materials at issue here—the millions of routine letters, cards or invitations to or from the President, the reams of bulk printed material, and the routine files, which are of little concern either to Congress or to the appellees—would bring the government to a halt. And it is particularly telling in this regard that since the date Mr. Nixon resigned from office more than two years ago, there has not been a single request by the executive branch for access to the tape recordings of his conversations for purposes of continuing government business.

In concluding our discussion of this alleged "interest," two final points are worth noting:

First, the right of the executive branch to secure particular materials of Mr. Nixon's administration for

[52] The "need" for access to Mr. Nixon's National Security Counsel files at the time the government's evidence was submitted had included about a dozen instances to do such things as checking the "guest list" for a dinner given for Prime Minister Trudeau, checking dates on backchannel traffic, responding to FOIA requests, and attempting to identify a paper requested by the Church Committee (App. 665-693).

current government business has been established by historical practice and by *Folsom* v. *Marsh,* 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841) (Story, Circuit Justice).) That right, if it *ever* needs to be exercised, exists *independent of any legislation by Congress.*

Second, this case does not involve an Act giving the incumbent President special rights of access limited to documents needed for ongoing business. The Act simply seizes every single document, recording or object produced and maintained in the White House by Mr. Nixon and his personal staff and directs their search and ultimate public disclosure. The reach of the Act bears no resemblance to the situation hypothesized by Mr. Justice Story in *Folsom* v. *Marsh,* for it goes far beyond national security and current government business.

4. *The Subordinate Interests*

The district court enumerated three interests that it deemed less significant, but nonetheless relevant. The first relates to the "Watergate affair" and the judgment that allegations covering it "have undermined the nation's faith in its political processes and its confidence in its future." On this basis, "a full airing of these events by disclosure of materials whose contents are peculiarly informative" was viewed as a "legitimate congressional pursuit" (J.S. App. 58a).

But the items seized do not in any manner coincide with that legislative "pursuit." The Act's time frame far exceeds any that relates to the "Watergate affair" and the subject of the materials sequestered is not limited to the matters that allegedly affect national

morale.[53] More fundamentally, the license given Congress by legitimization of such an interest is extraordinary. Every presidential action that is unpopular in one quarter or another could, by the same description, become a subject for the "airing of these events by the disclosure of materials whose contents are peculiarly informative." Inflation and unemployment have undermined the nation's "confidence in its future." Could Congress sequester all of President Ford's internal memoranda and notes of conferences on the "WIN" program and on national economic policy in order to "air the events" for the public? If the refusal to grant amnesty to those evading service in the Vietnam war is found by Congress to have "undermined the nation's faith in its political processes," may Congress force disclosure of memoranda given to the President on the subject?

The criminal process provides whatever public remedy is appropriate to deal with concerns of this kind. To the extent that there was reason to believe criminal laws were violated, grand juries have conducted investigations, indictments have been returned and trials have been held. If the President's conduct was being

[53] The overbreadth of the Act with respect to the "Watergate" interest is demonstrated by the fact that the Watergate Special Prosecutor, under an agreement reached informally with Mr. Nixon's counsel, completely satisfied his needs with respect to access to Mr. Nixon's tape recordings by requesting 55 conversations he assumed might pertain to possible violations of criminal law. Only 43 of the designated conversations in fact took place, and of those only 16 pertained to the subject matter of the Special Prosecutor's inquiry. In short, out of approximately three and a half years of recorded conversations available to the Special Prosecutor, only 16 conversations were relevant to his "Watergate" inquiries. The Special Prosecutor has withdrawn from this litigation because his interests have been fully satisfied. Motion of Special Prosecutor for Leave to Withdraw, September 8, 1975.

challenged, the proper route for that was by invoking the Impeachment Clause, which was done. Beyond that, it has been clearly established by *Watkins* v. *United States,* 354 U.S. 178, 200 (1957), and *Barenblatt v. United States,* 360 U.S. 109, 133 (1959), that "there is no congressional power to expose for the sake of exposure." The "interest" relied on by the district court was "exposure" for its sake alone.

A second asserted subordinate interest is even more extraordinary and totally destructive of the separation of powers doctrine. The court below stated that Congress might need Mr. Nixon's presidential materials in order to enact legislation, presumably in relation to the operation of the Presidency (J.S. App. 59a). In this respect, the Act itself does not dare tread as far as the district court did. It does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it. Plainly, a law that would subject internal presidential memoranda directly to congressional scrutiny for possible legislative purposes in structuring the "institutional design" of the Presidency would be an outrageous affront to the separation of powers principle. Could the President have his appointed Attorney General or United States Attorney seize the entirety of a Senator's internal files so as to make informed policy decisions and propose legislation streamlining congressional procedures? Could either the President or Congress seize all the papers of a Justice of this Court as "a necessary predicate to informed consideration" of proposed legislation improving the judicial process?[54]

[54] J. Lee Rankin, counsel to the Public Documents Commission established under Title II of the Act which is currently considering

The final "interest" cited by the district court was the need to maintain the materials in case they are ever needed in civil or criminal litigation (J.S. App. 60a-61a). The former President's depository agreement specifically provided for such availability for a period of years—five for the tape recordings and three for documentary materials (App. 111-112). The district court discounted this fact, however, by hypothesizing that Mr. Nixon and the Administrator (to whom Congress entrusted the materials totally under the Act) might change the agreement to cover a shorter period (App. 61a). And the court speculated that future cases might arise requiring access beyond the three and five year periods (App. 61a).

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legislation with respect to the materials of all future constitutional officeholders, cites this interest as one which could justify legislation concerning the papers of justices and judges. In Mr. Rankin's words:

> to the extent, however, that greater public knowledge of the judicial process can be said to promote wider public understanding of governmental processes generally, such greater education of the public can influence voters' decisions. Though federal judges are not directly chosen or subject to recall at the polls, public pressure can be brought to bear on the elected representatives of the people who make those choices. The Commission will, therefore, want to consider the extent to which greater access to judicial materials might facilitate the public's exercise of First Amendment rights.
>
> . . . .
>
> The Commission will also want to consider whether Congress needs greater access . . . to the records of the judiciary. . . . It is also possible, since Congress often legislates in areas first entered upon by judges and has the constitutional power to alter the court's jurisdiction, that greater access to judicial records would aid the Congress in the exercise of its legislative responsibilities (subject to protection of all rights and privileges).

[Memorandum of Commission counsel, Public Documents Commission, October 5, 1976, at 6, 10-11]

The problem with the court's explanation of this interest is that the only problems it cited could have been accommodated fully by more precise and narrow measures than the present Act. A simple criminal statute prohibiting destruction of any item would have carried out the goal of future availability. And if such a law were thought not to be sufficient safeguard, all materials might be held in joint custody for an extended period of time—well beyond any conceivable statute of limitations. In short, this "interest" could only justify *retention* of the materials, not the extraordinarily expansive, time consuming and intrusive procedure of screening, transcribing, classifying and allowing public access. If Congress' legitimate interest was preservation for judicial action, these other measures provided by the Act must be stricken as unnecessary and unconstitutionally intrusive.

F. The Act Is Overbroad In Relation To Whatever Legitimate Interests Are Cited To Sustain It.

For the reasons discussed above, we submit that Title I of the Act is unconstitutional because it invades the sphere of authority reserved to the President under the Constitution. We turn now, however, to an alternative argument that assumes, *arguendo*, that Congress could, with appropriate legislation, subject certain presidential materials to the kind of sequestration, screening and public disclosure that this Act contemplates. Even if one were to agree that such an objective is permissible, the means chosen by Congress in this Act are unconstitutional because they go beyond what is reasonably necessary to achieve any legitimate legislative objective.

We have discussed previously (pp. 49-52, *supra*), the reasons why we believe that it is appropriate to

utilize, for purposes of the separation of powers issue, the same "overbreadth" analysis that this Court has applied repeatedly to First Amendment cases. Not only is this a situation where First Amendment rights are directly involved (see pp. 164-176, *infra*),[55] but the same "chilling effect" that stifles constitutionally protected expression or association when it is the subject of an overbroad law comes into play when a sweeping statute relates to an area assigned exclusively or primarily to a branch of government other than the legislature. If an overbroad law that restricts presidential authority or inhibits presidential confidentiality is permitted to stand, future Presidents—apprehending that such a law might be applied to them—will alter the way they perform their duties. A sweeping law such as this one might well reduce the memorialization of various steps in the presidential decisionmaking process or might encourage an incumbent President to institute a policy, while he is in office, of routine destruction of documents reflecting internal deliberations.

For this phase of our argument, we assume, *arguendo,* that Congress could have enacted a law that sequestered the public documents of Mr. Nixon's Presidency—*i.e.,* those items that were produced by him in an official capacity or that related to his official functions.[56] We assume further that Congress could have directed that this limited class of documents be subjected to a screening and evaluation process directed towards publication of some or all of them. But it does not follow from these assumptions that the law actually enacted—which goes far beyond any legitimate legislative objective—is constitutionally permissible.

[55] A President's freedom of political expression and association can be effectively stifled by an overbroad law that seizes and subjects to word-by-word review all of his personal conversations. It is not fanciful to assume that if a law such as this one is sustained, future Presidents will not reduce to writing their messages or notes on political subjects and will surely not record any thoughts or conversations on sensitive political topics.

[56] In this regard, the provisions of the proposed but rejected floor amendment to the Act (see note ——, *supra*) are illustrative of a more limited definition.

We begin with the proposition reaffirmed by this Court in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217-18 (1975), that "[w]here First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." In this statute, as in the law appraised in *Erznoznik,* both prerequisites are absent. As we have previously discussed (pp. 33-36, *supra*) the extraordinarily broad sweep of Section 101 brings within its coverage every possible piece of Nixon memorabilia, whether or not there is a legitimate national interest in examining it and subjecting it to public disclosure. The fact that, as the court below recognized, "[v]irtually any item might be needed by a historian" (J.S. App. 62a), aggravates and does not resolve, the overreach of the statute. A historian may believe there is public interest or curiosity in some aspect of a President's behavior or in some internal bickering within a President's staff; the historian's interest is not, however, the lodestar of the national interest. Calvin Coolidge remarked in his The Autobiography of Calvin Coolidge (1929) p. 184:

> Everything that the President does potentially at least is of such great importance that he must be constantly on guard. This applies not only to himself, but to everybody about him. Not only in all his official actions, but in all his social intercourse, and even in his recreation and repose, he is constantly watched by a multitude of eyes to

> determine if there is anything unusual, extraordinary, or irregular, which can be set down in praise or in blame. Oftentimes trifling incidents, some insignificant action, or unfortunate phrase in an address, an injudicious letter, a lack of patience towards someone who presents an impossible proposition, too much attention to one person, or too little courtesy towards another have been magnified into the sensation of the hour. While such events finally sink into their proper place in history as too small for consideration, if they occur frequently they create an atmosphere of distraction that might seriously interfere with the conduct of public business which is really important.

The kinds of items sequestered by the Act are, therefore, far more extensive than any legitimate governmental objective. This breadth runs afoul of the constitutional standard applied by this Court to similarly broad mail censorship regulations held invalid on their face in *Procunier* v. *Martinez,* 416 U.S. 396 (1974). Among the tests applied there by the Court was the rule that (416 U.S. at 413-414; emphasis added):

> the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration *will nevertheless be invalid if its sweep is unnecessarily broad.*

This proposition had its genesis in *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), where the Court noted that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

For reasons we have previously outlined, various sections of Title I of the Act must be invalidated under this standard. In Section 102(d), Congress has overbroadly granted future executive officials access to internal documents and conversations reflecting political deliberations among Mr. Nixon and his advisers. The statutory criterion—"lawful Government use"—is not coextensive with the policy that is being implemented. If Section 102(d) is intended to relate to the few instances when ongoing government operations might require access to Mr. Nixon's materials (see pp. 113-117, *supra*), the statute should have been more narrowly drawn to limit the availability of the materials to those situations. And it was not necessary, in order to achieve this purpose, to subject all of Mr. Nixon's materials at the outset to the screening and review process which the Act contemplates.

Nor was it necessary to sequester all of the former President's materials in order "to assure a full and accurate account of 'Watergate' and to provide a basis for legislation and executive action to prevent future 'Watergates.'" H.R. Rep. No. 1507, 93d Cong., 2d Sess. 8 (1974). The challenged legislation authorizes a full review by a staff of government employees of millions of documents and thousands of hours of tapes on countless domestic and foreign issues, and personal and political topics totally unrelated to "Watergate." In fact, sponsors of the Act specifically *refused* to amend the Senate bill to limit its scope to the Watergate period. 120 Cong. Rec. 18248 (1974). One would be hard pressed to describe such legislation as anything but "unlimited and indiscriminate" in its scope, going "far beyond what might be justified in the exercise of the State's legitimate inquiry." *Shelton* v. *Tucker,* 364 U.S. 479, 490 (1960).

Finally, there is no justification that has been enunciated or that may be conceived that would explain why, since the only interest warranting seizure of all the materials is historical preservation, this Act is limited to those of only one President in the Nation's history.[57] In this statute, Congress has singled out one former President from all the others by abrogating his depository agreement, executed pursuant to 44 U.S.C. 2107, while leaving untouched those of other Presidents executed under the very same statute. Their agreements, like Mr. Nixon's, provide for deposits subject to the donor's ability to restrict access to any materials he or his designees deem embarrassing to the donor, his family, or other persons including relatives and friends (Hoover, App. 69-70; Truman, App. 80; Eisenhower, App. 85-87; Kennedy, OM, App. 91-93; Johnson, App. 99-101). Those agreements, like Mr. Nixon's, permit the donor to decide what will be deposited (Hoover, App. 63; Truman, App. 73; Eisenhower, App. 84; Kennedy, App. 90; Johnson, App. 98). And those agreements, like Mr. Nixon's, provide for the removal from deposit of items which the donor or his designees may desire for personal use (Hoover, App. 69; Truman, App. 79; Kennedy, App. 90; Johnson, App. 101).

Despite the identical provisions designed to assure each of these Presidents, their families and staffs continued confidentiality even to the present day, Congress has focused solely on Mr. Nixon's agreement. In so doing, Congress ignored valuable historical material such as the tape recordings of President Kennedy's conversations that have not been donated to the gov-

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[57] This aspect of the law also renders it violative of the Bill of Attainder Clause. *See* pp. 130-141, *infra.*

ernment (App. 482-483), and those of President Johnson that he donated under a fifty year access restriction (App. 467). Congress' action in this regard is both constitutionally underinclusive and overinclusive. The aim of historical preservation, if legitimate, rationally applies equally to the papers of past, present and future Presidents, to Vice-Presidents and perhaps no less to legislative and judicial figures. This lack of precision in matching the terms of the Act to its objectives undermines congressional claims that there was a pressing need for this measure and renders it unconstitutional.

There is a simple and straightforward reason why the justifications now provided for this legislation do not match its specific terms: these interests are after-the-fact rationalizations for a law that was adopted principally in reaction to frenzied public opinion concerning the "Watergate affair." This conclusion emerges indisputably from an examination of the legislative history of the Act.

The Senate Committee on Government Operations that reported to the full Senate the portion of the law that is now challenged (*i.e.,* Title I), barely discussed —much less emphasized—the "important interests" which the court below discerned and which are now cited in support of the Act. Rather, the Senate Committee justified this Act as one designed to preserve "additional evidence" relating to "the 'Watergate affair,' as it is popularly known." S. Rep. No. 93-1181, 93d Cong. 2d Sess., p. 3. Fearing that certain tape recordings concerning that subject were "in imminent danger of destruction" (*id.* at 4), the Senate Committee viewed this legislation as dealing with a subject of "importance and urgency"—so much so that it pressed

the Congress "to act expeditiously" on the proposed bill and enact it without any hearings whatever. *Ibid.*

The conclusion of the Senate report, in full, reads as follows (*id.* at p. 6):

> The Committee concludes that legislation must be enacted promptly to protect and preserve the papers, documents, memorandums, tape recordings, and transcripts originating during the presidency of Richard M. Nixon in order that all facts about the Watergate affair may be made available to the American people and to the courts, prosecutors, and individuals involved in trials arising therefrom. S. 4016, as amended, will provide such adequate protection and preservation.

The House of Representatives added to the bill the sections that now appear as Title II.[58] The House report—unlike its Senate counterpart—did refer briefly to the "legitimate public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance." H. Rep. No. 1507, 93d Cong., 2d Sess., p. 2. It also described, as one of several shortcomings of the "Nixon-Sampson Agreement," its alleged disregard of "the needs of Congress and executive agencies for continued use of the documents in the process of government." *Id.* at 3. But the House report, in total, emphasized the Con-

[58] Neither House of Congress held hearings on the Act we challenge here. In two days of hearings on the Title II provisions, however, the House Committee learned that the issues relating to the subject of control of presidential materials are complex and involved philosophical questions of national policy. Hearings Before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902 and Related Legislation, 93d Cong., 2d Sess.

gress' overriding absorption in the "Watergate affair," as manifested by its concluding observation regarding Title I (*id.* at 8):

> Clearly, it is in the public interest to preserve the materials and to provide access to the materials for judicial proceedings to expeditiously complete the prosecution of Watergate related crimes and to permit the just resolution of other adjudications requiring access to the materials. Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of "Watergate" and to provide a basis for legislation and executive action to prevent future "Watergates" and clearly it is in the public interest to safeguard the historical record of the Presidency during the last five and one-half years.

We direct this Court's attention to the disparity between the reasons expressed at the time of enactment, which motivated Congress to enact this legislation, and the grounds upon which it is defended in court more than two years later not because we are asking this Court to divine the true "motives of the legislators" or because our legal argument depends on which of the professed policies is viewed as the dominant one. Rather, we believe that it is important to emphasize that the Court does not have before it a fully considered and deliberate legislative judgment of how to preserve "Presidential Recordings and Materials," reached after plenary congressional consideration of relevant policies, likely consequences of particular bills, historical and constitutional analysis and due legislative debate. This case concerns, instead, a stopgap measure, devised in great haste by legislators who were witnessing a Nation preoccupied with the "Watergate affair"

and were, consequently, reflecting the popular passions engendered by that singular series of events. So long as this ill-considered legislation remains on the books it has a seriously damaging effect on the appellant. And so long as its presumed constitutionality remains unimpaired, any incumbent and future President must conduct his affairs in a manner that takes account of the possibility that his materials may ultimately be the subject of similar legislation.

A statute so broad and so sweeping—a law that cuts so deeply into the ability of a President to be master of the day-to-day operation of the office that the Constitution commits to him and that offends a panoply of other constitutional rights held by a President in common with every inhabitant of the land—should not be permitted to stand as a precedent for future legislation which might affect not merely the Chief Executive but other branches of government.

II

THE ACT VIOLATES THE BILL OF ATTAINDER CLAUSE BECAUSE IT INCORPORATES A LEGISLATIVE JUDGMENT OF INDIVIDUAL BLAMEWORTHINESS RATHER THAN ESTABLISHING A RULE OF GENERAL APPLICABILITY

Earlier in this brief we discussed the fact that Title I of the Act is limited, by its express terms, to the Presidency of Richard Nixon. It sequesters the papers and other materials of only his administration, leaving those of his predecessors and successors to the customary practice that has always been followed and to the conditions imposed by the individuals who occupied the presidential office. Similarly, the Act selects only the papers of the President.[59] Although other govern-

[59] A recent opinion by the former Legal Adviser of the Department of State to Henry A. Kissinger, formerly Secretary of State, advised Mr. Kissinger that stenographic records of his telephone conversations were "personal papers" which Mr. Kissinger could retain on leaving office. The Legal Adviser noted that the Presidential Recordings and Materials Preservation Act did not apply because the statute, "on its face applies to 'the Presidential historical materials of Richard M. Nixon' and not to personal papers of individuals who served under him." Memorandum to the Secretary from the Legal Adviser, November 11, 1976, p. 4.

ment officials are alleged to have been involved in one form or another in the subject generally known as the "Watergate affair" and in the "abuses of governmental power" which Section 104(a)(1) purports to cover, the Act does not reach the material maintained by any other public official.

Why was Mr. Nixon selected for this singular treatment? The court below had no difficulty observing, at various instances throughout its opinion, that the Congress could reasonably have concluded " . . . that there was misconduct on the part of Mr. Nixon and his close associates" (J.S. App. 47a). This premise was phrased differently at different places:

> [1] . . . Congress had before it an adequate basis for concluding that responsible processing of the materials in accordance with important public interests could be better ensured if the materials were entrusted to government archivists (J.S. App. 48a).
>
> [2] . . . To begin with, Congress might legitimately have entertained doubts about whether Mr. Nixon would not violate such a prohibition (J.S. App. 48a n. 35).
>
> [3] . . . Congress had before it an adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials at issue. This aspect of the case provides a basis for distinguishing him from other Presidents, whose incli-

> nation to serve important public interests in disposing of such materials Congress had less reason to question (J.S. App. 96a).

The "misconduct" or "unreliable custodian" proposition pervaded the reports and the legislative debate on the bill.[60] Senator Ervin was the Senate floor manager of the bill, and his repeated references to the endless hours of testimony on "Watergate" had only a single implication: Mr. Nixon was, in some way, blameworthy, and he personally could not be trusted to dispose properly of the tape recordings of his conversations, of his internal memoranda, and of all other materials of his Presidency. This factor, as the district court noted, is what distinguished him, in Congress' mind, from "other Presidents." If not for that one

[60] *E.g.*, S. Rep. No. 1181, 93d Cong., 2d Sess. 4 (1974) ("The net effect of these provisions [of the depository agreement] is to place the tape recordings in imminent danger of destruction. . . . Moreover, the agreement suggests that Mr. Nixon, or his designee, could start destroying all the papers and materials (other than the tapes) by 1977. The ultimate destruction of the tapes, coupled with the difficulties in obtaining access to the other Nixon materials, would be a fundamental violation of public policy."); H.R. Rep. No. 1507, 93d Cong., 2d Sess. 3 (1974) ("This arrangement would permit Mr. Nixon to remove and destroy any of the documents if he wishes to do so. . . . By allowing Mr. Nixon to destroy all of the materials, the agreement ignores the public interest in preserving them.") Both reports cited the fact that high-ranking officials in the Nixon administration had been charged with federal offenses growing out of the "Watergate affair." S. Rep. No. 1181, *supra* at 3; H.R. Rep. No. 1507, *supra* at 2. Senator Ervin explained that the bill seized all material beginning with Mr. Nixon's inauguration "because it was the period for which he accepted the pardon for all crimes he had committed or may have committed against the United States." 120 Cong. Rec. 18320 (1974). He explained that "[a]ll that the committee bill is designed to do is to protect for future use in the Courts of the tapes and other documents which evidence criminal acts" (*id.*).

element, it is plain that there would be no conceivable rational basis for enacting a law that seizes only his papers, subjects only his documents and recordings to intensive screening, and places only on him the burden of securing restrictions on papers that contain confidential material.[61]

We submit that this legislative premise of individual culpability—even if phrased, as the court below phrased it, in terms such as "Congress had before it an adequate basis" or "Congress might legitimately have entertained doubts"—is precisely what the Bill of Attainder Clause prohibits. Congress may not enact a statute that applies to a single individual and subjects him or her to treatment different or worse than others receive, entirely on the basis of a *legislative judgment* of blameworthiness. Under our system of

[61] Senator Ribicoff commented on this obvious unfairness in an exchange with the Administrator during hearings on implementation of the law.

> Mr. Sampson: . . . Under this particular Act, we are changing the ground rules drastically—very, very drastically in this case. That power [to protect confidentiality or privacy] no longer resides with President Nixon as it did with prior Presidents. . . .
>
> Senator Ribicoff: And all succeeding Presidents?
>
> Mr. Sampson: This Act pertains only to President Nixon.
>
> Senator Ribicoff: Do not we have a problem here? You know, President Nixon was a President who had troubles. To me there is a sense of unfairness just to have a proceeding that applies to one of the Presidents.
>
> If these papers belong to the public domain, should not we be passing a law that applies to future Presidents? I feel uneasy singling out one President to be treated differently than any President in the past or for any President in the future . . .

Hearings on Implementing P.L. 93-526 Before Senate Comm. on Government Operations, 94th Cong., 1st Sess. 15-16 (1975) (transcript).

government, individualized appraisals of guilt or innocence are the job of courts or other adjudicative bodies; legislatures are not equipped for such tasks, and the legislative process incorporates none of the protections that enable affected individuals to defend against such findings.

This was the teaching of this Court's most recent bill of attainder decision. In *United States* v. *Brown,* 381 U.S. 437 (1965), this Court provided an extensive discussion of the rationale behind the Bill of Attainder Clause contained in Article I, Section 9, clause 3 of the Constitution. It said (381 U.S. at 442):

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

The Court went on to note that legislatures "feel all the passions which actuate a multitude" and to quote Alexander Hamilton's warning that "[n]othing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature . . .". 381 U.S. at 444.

Against this background, said the Court, the Bill of Attainder Clause "reflected the Framers' belief that

the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." 381 U.S. at 445. The dangers of legislative trials were those specified by Professor Cooley in his treatise on Constitutional Law—that legislatures are "peculiarly susceptible to public clamor . . ." and are unable to try an accusation impartially, "especially in those cases in which the popular feeling is strongly excited . . . ." 381 U.S. at 445 *citing* 1 Cooley, Constitutional Limitations 536-537 (8th ed. 1927).

Accordingly, the Court concluded that the ban on bills of attainder was an effort "to guard against such dangers *by limiting legislatures to the task of rule-making.*" 381 U.S. at 446 (emphasis added). The Court then quoted from the classic case of *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87, 136 (1810):

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.

The statute involved in the *Brown* case was one which declared that any member of the Communist Party was ineligible, for a period of five years after termination of his membership, to serve as an officer or employee of a labor union. The Court held that this constituted a bill of attainder—"legislative punishment, of any form or severity, of specifically designated persons or groups." 381 U.S. at 447. The Court said that Congress undoubtedly had the power "to enact legislation designed to keep from positions affecting interstate commerce persons who may use such positions to

bring about political strikes." 381 U.S. at 449-450. The statute in *Brown,* however, was not framed in "rule-making" terms (381 U.S. at 450):

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

In a later footnote in its *Brown* opinion, the Court summarized "[t]he command of the Bill of Attainder Clause" as follows (381 U.S. at 454 n. 29):

> . . . that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics . . .

And at the conclusion of its decision, the Court restated the general principle (381 U.S. at 461):

> . . . Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied.

There is no way, we submit, that Title I of the Act can be squared with these constitutional principles. If Congress was concerned here with the question whether

Mr. Nixon was " a wholly reliable custodian" of his presidential papers, if it entertained doubts as to whether he would "violate a prohibition" against destruction of documents, if it believed that there had been "misconduct on the part of Mr. Nixon and his associates," Congress was obliged to enact a statute of general applicability that would leave to judicial determination the question whether he "possesses those characteristics." In a judicial proceeding under a statute establishing a general standard, Mr. Nixon would have had the opportunity to be represented by counsel, to cross-examine witnesses, to present evidence on his own behalf, and to submit arguments on the law and the facts. In the legislative process that led to this statute—precisely because of "public clamor" and in an atmosphere where "the popular feeling is strongly excited"—there was no such opportunity.

It would have been easy for Congress to enact a law that would not have violated the Bill of Attainder Clause and would have reserved to Mr. Nixon the rights that that clause was designed to secure. If Congress had provided that the Attorney General or the Administrator of General Services could institute a civil suit in an appropriate federal court to enjoin disposition (or even to transfer custody) of presidential historical materials (or any other important historical records) by any person who could be shown to be an "unreliable custodian" or who had "engaged in misconduct" or who "would violate a criminal prohibition," the statute would have left to judicial determination, after a fair proceeding, the factual allegations regarding Mr. Nixon's blameworthiness. Power to issue restraining orders and temporary injunctions would have given such a law the same immediate effect that the 1974 Act had.

But Congress did not leave the judicial function to an Article III court, as the Bill of Attainder Clause and the separation of powers principle require. Instead, it engaged in a classic "trial by legislature." It determined that Richard Nixon could not be trusted to dispose properly of his materials, and it named him in its legislation.[62]

This Court noted in the *Brown* case that the law at issue there did "not contain the words 'Archie Brown' . . ." 381 U.S. at 461. Yet it determined that the identification of the Communist Party as a group turned the statute into a bill of attainder because Congress is not constitutionally permitted to engage "in specification rather than rule-making." 381 U.S. at 454. Obviously, if the Congress that enacted the provision of the Landrum-Griffin Act that was in issue in *Brown* had heard testimony regarding Archie Brown and had determined, from such testimony, that Archie Brown was too unreliable to serve as a union officer and too likely to

[62] A perceptive Comment on the *Brown* decision appears at 54 Calif. L. Rev. 212 (1966). It demonstrates the validity of the Court's analysis that the Bill of Attainder Clause was designed to keep the legislature from exercising judicial functions. The Comment identifies "specificity" as one element of a bill of attainder, and observes that "specificity in its classic sense is present in a statute when the legislature has identified by name the person or persons who will be subject to the statute's sanctions." 54 Calif. L. Rev. at 235. After analyzing the "punishment" element (which it describes as "the most fertile source of confusion" *id.* at 238), it concludes that "[t]he proper approach is to determine whether the challenged statute imposes a deprivation typically associated with bills of attainder"—included among these are "exclusion from a job or profession, banishment and *confiscation of property*" (*id.* at 242; emphasis added). The third element—often overlooked—is the absence of a judicial trial, because it is the "procedural safeguards" of such a trial that are imperative.

call political strikes if he occupied such a post, it could not enact a law disqualifying him personally, by name, from union service. The appellant in this case is not entitled to less in the way of constitutional rights because he served the country as President for 5½ years, no matter what the "passions which actuate a multitude" may have been in 1974 or may be today. By singling him out for this legislative disability, Congress violated the Bill of Attainder Clause.

The district court asserted that the Bill of Attainder Clause was not violated because there was no "punitive motivation" and no "punitive intent or character" in the statute (J.S. App. 98a-99a). Again the district court ignored the *Brown* case—the most recent authoritative pronouncement on the subject. This Court said in *Brown* that punitive intent—in the form of retribution—was *not* an essential element of a bill of attainder. It concluded that the Bill of Attainder Clause would be violated even if the statute "were enacted for preventive purposes." 381 U.S. at 458. The legislative fear "that a given person or group was likely to cause trouble" and should be subject to deprivations "in order to keep it from bringing about the feared event" (381 U.S. at 458-459) was said to be the objective of "a number of English bills of attainder."

Even if Congress' desire here was to effectuate "a preventive, not a vindictive policy" (381 U.S. at 459, quoting from 3 Hamilton, History of the Republic of the United States 25 (1859)), it could not do so by specifying Mr. Nixon by name. This Court in *Brown* noted that the congressional purpose in *United States* v. *Lovett,* 328 U.S. 303 (1946), an earlier bill of attainder decision, was to remove from government serv-

ice those whose "continued employment [was] dangerous to the national welfare." 381 U.S. at 460. This preventive purpose sufficed to make the challenged law a bill of attainder.[63]

Nothing could be more clear than that Congress was seeking to remove Mr. Nixon from authority over his presidential papers because it feared that if he had the authority that other Presidents possessed, documents or recordings might be destroyed. This preventive purpose is identical in kind to the legislative purposes in *Brown* and *Lovett,* and it follows from those cases that the Act is invalid.

Finally, it must be noted that the immediate harm to Mr. Nixon is more than superficially punitive. He has been deprived for more than two years of ready access to and control over the most personal materials of the years when he occupied the highest office in the nation. He has had taken from him the entire record of this period of his life, and he has been told that they will be examined, word-by-word, by dozens of persons whom he does not know and has no reason to trust.

The disability imposed on Archie Brown by the law found to have been a bill of attainder in the *Brown* case was, by comparison, less of a hardship than what this Act has inflicted on Mr. Nixon. What was done here to Mr. Nixon is clearly "confiscation of property"—a traditional punishment associated with bills of attainder. Even if "just compensation" is offered

[63] The majority of the Court in *Lovett* rejected Mr. Justice Frankfurter's suggestion that a bill of attainder could be identified by the fact that it constituted retribution for past acts, which had to be accompanied by a legislative intent to punish. 328 U.S. at 324-325.

or paid,[64] the property of the former President has plainly been taken. This the Constitution simply does not allow.

III

THE ACT VIOLATES MR. NIXON'S CONSTITUTIONAL RIGHT OF PRIVACY AND HIS LIBERTY OF POLITICAL EXPRESSION AND ASSOCIATION

We turn now to the effects of this law on the fundamental rights Mr. Nixon shares with every inhabitant of this land—rights of expression and privacy protected by the First and Fourth Amendments. By voluntary entry into public life an elected official surrenders certain privacies that are secured by law for those who elect not to place themselves in the public spotlight. *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). But this does not mean that a public figure—or even the most public of all figures (such as the individual serving as President)—is stripped of all legal protection for his privacy. In their seminal discussion, which underlies the development of privacy law over the past three-quarters of a century, Brandeis and

[64] The only case of which we are aware that deals with governmental taking of a person's papers under the power of eminent domain is *Porter* v. *United States,* 473 F.2d 1329 (5th Cir. 1973), wherein Lee Harvey Oswald's widow sued for compensation for articles seized in the investigation of President Kennedy's assassination. The articles included a diary and some letters of Oswald. 473 F.2d 1331-32. The taking in *Porter* is completely dissimilar to the taking here. The items had already been *legally* seized by officers immediately following the assassination, and thus Mrs. Oswald had not been deprived of the rights and of expectations which Mr. Nixon here asserts. Moreover, as the district court indicated, there was no challenge to the right of the United States to condemn the property. It was a suit strictly for compensation. 335 F. Supp. 498, 500 (N.D. Texas 1971).

Warren recognized that protection need not be granted "to whatever degree and in whatever connection a man's life has ceased to be private . . ." but even as to public figures, they cautioned that a shield for privacy is warranted for matters that "have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity." Brandeis & Warren, *The Right to Privacy,* 4 Harv. L. Rev. 193, 215-216 (1890).

This Act effects a wholesale invasion of Mr. Nixon's privacy rights for the entire period he served as President. It also offends his rights under the First Amendment by intruding on conversations and communications that constitute political expression and association not related to the business of government. The Act has these drastic effects because the President—unlike other high civilian officials of the United States—is totally enveloped by the living conditions that the position necessarily imposes on its occupant. A President's personal security is among the highest priorities of various federal agencies; he and his family are expected to live where he works and to be available at all hours of the day and night. Moreover, he functions throughout his Presidency in the dual capacities as political head of his party and as President. It is, therefore, extraordinarily difficult for a President effectively to separate his private life from his official work.

In this case the difficulty has been heightened because this statute was enacted after the fact—*i.e.,* after the termination of Mr. Nixon's Presidency. The Act is not prospective in operation. It gave Mr. Nixon no opportunity to take the steps suggested by the district court "to prevent commingling, to prevent retention of some materials, or to take other steps to protect his

privacy" (J. S. App. 71a-72a). Indeed, the district court held that the consistent practice of "de facto control of presidential materials by former Presidents" gave rise to a "reasonable expectation of privacy" on Mr. Nixon's part (J. S. App. 74a n. 55). It is with these two considerations in mind—the all-pervasive obligations of the office and the absence of any advance warning—that appellant's Fourth and First Amendment claims must be evaluated.

A. The Seizure and Examination of All Mr. Nixon's Materials, Including His Most Private Communications, Unreasonably Invades His Constitutional Right of Privacy.

The Act operates to seize every tape recording produced in Mr. Nixon's various offices and residence quarters while he was President and all other items of any description which constitute "Presidential historical materials" (Sec. 101(a),(b) (pp. 33-34, *supra*)). Without mandating the return of "personal" materials, the Act directs the Administrator "to take into account" the need to return to the former President's sole custody "tape recordings and other materials which are not likely to be related to [informing the public of 'Watergate'] *and* are not otherwise of general historical significance" (Sec. 104(a)(7) (emphasis added)). The impracticality of accommodating that need is reflected by the Administrator's proposed regulation which—in defining "private or personal materials" as those "relating solely to a person's family or other nonpublic activities and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff" (Proposed Reg. § 105-63.104(b)), —provides that private or personal materials will be retained by the government if they are intermixed with histori-

cal materials in one document or tape. GSA Legal Explanation of Public Access Regulations [under P.L. 93-526] G-4 (1975).

What is the extent of this statute's intrusion on Mr. Nixon's private life? His testimony reveals the intimacy of the materials that have been seized (App. 175-76):

> . . . Because of the long hours that I was required to spend away from my family while President and even before that as Vice President, Senator and Congressman, my daughters adopted the practice of leaving personal notes at my office or in my residence so that at the end of the day, if they were not around, I would have at least a moment or two to learn what they had been doing or what their feelings or reactions were to my own activities. I valued, and still do, all of these very private and highly personal thoughts and deliberately preserved them among my presidential materials.
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> . . . As a private citizen, I engaged in correspondence with friends, associates and other individuals . . . . For example, I can recall correspondence between myself and law school friends concerning our class reunion. I can also recall some personal letters I wrote to families of young men killed in action in Vietnam. These letters, of course, were of little import to the nation or to anyone except myself and the recipient. Often, such personal letters were written in my own hand . . . . On one occasion I recall writing Mr. E. Guy Warren concerning an unpopular but important stand he had taken on a controversial subject. On another occasion I corresponded with members of my law practice concerning the circumstances under which my membership in the firm should be terminated. Other personal letters were sent to such persons as Mrs. Earl Warren, General J. D. Hughes, Elmer Bobst, Mrs. Lyndon Johnson, Patrick J. Buchanan, William Rogers, Mrs. Alice Roosevelt Longworth, Mrs. Bernard Brennan, Leonard Garment, and then Congressman Gerald R. Ford.

Such materials are in addition to the thousands of hours of conversations described earlier (pp. 21-25, *supra*) among the former President and his family, physician, clergy, attorneys and numbers of personal friends with whom he met during nearly a three-year period. But perhaps the most flagrant aspect of the Act's privacy invasion is the seizure and review by government employees of the former President's oral diaries in which he expressed his frustrations, feelings of exhilaration and other emotions experienced throughout the day (App. 178).[65]

The appellees stress that all of Mr. Nixon's private materials will be returned to him, which we have shown is not likely the case because of the physical properties of the tapes and papers. Nevertheless, even if some or all of such highly personal items were ultimately returned, the fact remains that government personnel will have irreparably invaded the former President's privacy. The screening and review process itself is what offends Mr. Nixon's right to keep private subjects private. The screening process to be applied to the tapes and materials involves no less than three levels of review of any materials that are to be returned to Mr. Nixon as "private" and "not of historical value." To suggest that such an intrusion will

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[65] As noted earlier, the former President's oral diaries are among the confiscated material in the form of unlabeled dictabelts and as simultaneously recorded on the voice-activated tape recordings (p. 22, *supra*).

be undertaken "professionally" or "discreetly" ignores the realities of the situation and the fact that privacy protection goes to the offensiveness of having one's personal effects unwillingly exposed to outsiders. The thought of having strangers listen to years of private conversations with one's wife and family would be horribly offensive to any person. Yet, under this Act, government employees will, at some point, find themselves listening to conversations between Mr. Nixon and his daughter prior to her wedding—conversations which all would agree are of the most intimate nature, with expressions by father and daughter of hopes, joys, fears, and sadness.

The right of privacy that precludes such an invasion is a well recognized and firmly established liberty secured by the Fourth Amendment and by the historical events that led to its adoption. The celebrated opinion in *Entick* v. *Carrington,* 95 Eng. Rep. 807 (1765), observed (emphasis added):

> Papers are the owners goods and chattels; *they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection;* and though the eye cannot by the law of England be guilty of a trespass, yet, *when private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass,* and demand more considerable dangers in that respect.

Mr. Justice Brandeis, in his classic dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928), spoke even more eloquently of "the right to be let alone," describing it as "the right most valued by civilized men." He described the objective of the Framers of the Bill of Rights with regard to privacy (277 U.S. at 478):

> They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

The Fourth Amendment flatly prohibits the kind of governmental intrusion upon personal privacy envisioned by this Act. That ban, which has stood fast even against assertions of grave urgency, surely should not be waived simply in order to secure what Congress believes to be a more complete historical record.

1. *The Act authorizes a "general search"*

One of the core principles embodied in the Fourth Amendment is the prohibition against general warrants, which were described in *Stanford* v. *Texas,* 379 U.S. 476, 481-484 (1965), as "blanket authority" for government officials "to search where they pleased" for contraband or other material subject to seizure. A general search, not limited by any restriction on "the things to be seized," enables government agents to look first, and determine only later what it is they are seeking.

The same evils that led to the constitutional condemnation of general warrants are present in this Act. The Act removes from Mr. Nixon's custody all papers and other materials collected over a five year period and directs government officials to review all these materials and decide, on the basis of that review, which fall outside the various "interests" Congress is said to have been implementing.[66] This sequence re-

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[66] Among Congress' explicit interests, of course, was evidence of alleged crimes. Senator Ervin explained this purpose twice during his presentation on the floor of the Senate.

> What we are after is the exercise of first amendment rights

verses the proper constitutional process. Even when the governmental interest at stake is the rule of law—*i.e.*, the investigation and apprehension of those who commit criminal offenses—search warrants and subpoenas may be executed only for specific documents or objects. Rummaging through all of an individual's belongings or through all his records in order to find which, if any, should be subject to seizure is an invitation to precisely the abuse that the Fourth Amendment was intended to prevent.

In *Kremen* v. *United States,* 353 U.S. 346, 347-48 (1957), for example, a search of two fugitives incident to their arrest was rendered invalid by the wholesale seizure of the entire contents of the house in which they were found. This Court reproduced as an appendix to its opinion the inventory of the items seized, suggesting that this procedure of seizing first and determining later which items might be properly kept was an impermissible one. Judge Learned Hand made the same point succinctly in *United States* v. *Poller,* 43 F.2d 911, 914 (2d Cir. 1930), when he said that "the real evil aimed at by the Fourth Amendment is the search itself, that invasion of man's privacy which consists of rummaging about among his effects to secure evidence against him."

The evil of such an uncontrolled search is aggravated when the material being "searched" is a written or recorded statement by the individual subjected to

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in connection with criminal conspiracies. [120 Cong. Rec. 18320 (1974)]

The only papers that would be taken from Mr. Nixon under it would be evidence relating to the criminal acts known as the Watergate Affair, that is all—plus documents of great historic value. [120 Cong. Rec. 18321 (1974)]

the search. As Judge Friendly observed in *United States* v. *Bennett,* 409 F.2d 888, 897 (2d Cir. 1969):

> The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries.

In administering the present Act the entire range of Mr. Nixon's personal conversations and communications must be read by government officials in order to discover which will be retained, which will be publicly disclosed, and which will be returned. If Congress had directed that materials not of "general historical significance" be returned to Mr. Nixon without any prior review by government employees, the invasion of Mr. Nixon's privacy would have been somewhat reduced. But the question would still remain as to where the line is to be drawn—an intractable issue. Do conversations that Mr. Nixon had with close friends, his wife or family, in which he related his personal worries or frustrations about the Middle East crisis or his satisfaction and excitement about the thawing of relations with China bear a "connection with his constitutional or statutory duties or political activities as President," even though he sought no official advice from these persons? Do thoughts about such topics retained by him on dictabelt diaries have a "connection with his constitutional or statutory duties or political activities as President," even though he considered these thoughts "exceedingly private?" As the Administrator himself acknowledged:

> From the practical point of view, the process of distinguishing, in day-to-day filing operations, between official documents and documents of a personal or political character is extremely difficult.

> Of course, it is easy to decide that the President's letters to his relatives are personal and that the promotion lists for the Armed Services are official, but in the vast area between two extremes, difficulties arise. [D. Lloyd, *The American Archivist,* quoted in GSA Report To Congress on the Implementation of P.L. 93-526, at B-1—B-2]

If there is a question as to whether a particular conversation should be returned as personal or should be disclosed in the interest of "accurate history," we submit that the constitutional quality of the right of privacy outweighs the generalized and less critical interest in history that finds no constitutional basis. Consequently, the former President is the only individual who may waive the privacy right and make the choice to disclose what was said.

The Act, however, does not provide Mr. Nixon the opportunity to segregate his own "private" materials under *any* definition of that term. Rather, it establishes a procedure which subjects all of his materials —official, personal, and political—to the review of no less than three groups of archivists. In order to fulfill the Act's mandate concerning disclosure of "Watergate" information "at the earliest reasonable date," the Administrator states that the first tier alone will require approximately one hundred government employees.[67] Accordingly, Mr. Nixon's most private thoughts and communications, both written and spoken, will be exposed to and reviewed by a host of persons whom he does not know and did not select, and in

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[67] *Hearings on GSA Regulations to Implement P.L. 93-526 Before Senate Comm. on Government Operations,* 93rd Cong., 1st Sess. 7 (1975) (transcript).

whom he has no reason to place his confidence.[68] This group will decide what is personal, to be returned to Mr. Nixon, and what is historical, to be opened for public review.

There is simply no precedent for such a wholesale seizure of and search through an individual's papers. Even in the civil subpoena process, the party subpoenaed has the right to object to overbreadth of the subpoena and to deliver, *after his own review,* only those documents "relevant in purpose" to the inquiry. *See See* v. *City of Seattle,* 387 U.S. 541, 544 (1967); *In re Horowitz,* 482 F.2d 72, 78 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973). And in criminal cases, the warrant must "particularly describe the 'things to be seized,'" *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965). Any disputed documents must be reviewed by an impartial judicial officer upon motion, not by an executive branch employee simply on request. None of these protections is afforded Mr. Nixon.

To be sure, the "general search" procedure contemplated by the Act is one that would more assuredly bring to the government—and possibly to public disclosure—all documents that could conceivably be of interest to it. To that end prosecutors who serve grand jury subpoenas or who secure search warrants would doubtless be happier if such process could be executed in the broadest possible terms, enabling them to review the material submitted or seized and then to determine what they would like to keep. The procedure estab-

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[68] This is in contrast to the practice of all prior Presidents who, in donating materials to Presidential libraries, have been able to pre-screen the materials to be deposited and to participate in the selection of persons who would review the materials for classification purposes (App. 65-67; 75-80; 84-88; 90-93; 98-103).

lished by this Act is comparable to a subpoena that directs a corporate officer to bring to an administrative agency all records of any kind in his possession whether or not they relate to the corporation's business. The agency clearly could not justify the issuance of such an overbroad subpoena on the theory that it—rather than the officer, whose self-interest may affect his judgment—must decide which documents relate to the conduct of corporate business. The risk that some documents may not be produced in response to a proper subpoena (enforceable, of course, by contempt or other penalty) is outweighed by the grossness of the invasion of privacy that accompanies the general search.

The district court tried unsuccessfully to distinguish the general warrant principle and *Stanford* v. *Texas* in footnote 63 of its opinion (J.S. App. 87a-88a). Its assertion, for example, that the search in *Stanford* was "enormously overbroad, encompassing material whose seizure was plainly unrelated to any legitimate government objectives" is not supported by the *Stanford* opinion. The legislation being enforced in that case was directed to the books and pamphlets which was "most of the material" seized. 379 U.S. at 479. In addition, of course, "files of . . . personal correspondence" were taken (379 U.S. at 480)—precisely what is at issue here. Nor does the *Stanford* opinion support the district court's claim that the intrusion into all of Stanford's personal papers maintained in his private home was conducted "in the hopes of finding a few pieces of incriminating evidence" (J.S. App. 88a n. 63). Stanford was, apparently, in the "mail order book business under the trade name 'All Points of View' " (379 U.S. at 479), and the object of the search

was to seize books that were said to violate the Texas Suppression Act in that they constituted "pro-Communist material." Hence the "300 separate titles" seized in the raid—which comprised the overwhelming bulk of the seized material—were, in fact, the intended objects of the search, not as the district court described it, randomly discovered "pieces of incriminating evidence."

The district court's assertion that the searchers in *Stanford* failed "to minimize the intrusion" also is unsupported by the opinion, which provides no description of what rooms were searched, whether the documents in portions of the house unrelated to the business were examined, or how the search was conducted. Beyond that, however, this Act also provides no evidence of any effort by Congress "to minimize the intrusion." The possibility that the Administrator, under repeated judicial urging, may take some voluntary ameliorative measures in the actual implementation does not rescue the law that Congress enacted.

Finally, the last two distinctions relied on by the district court are wholly unsupportable. First, it suggested that *Stanford* is different because it involved enforcement of criminal laws. If the court below meant to imply that there is *less* of a governmental interest in invading privacy when criminal laws are being enforced than when "historical accuracy" is the government's objective, the proposition is a startling one. Indeed, in *United States* v. *Nixon,* 418 U.S. 683 (1974), this Court's implication was squarely to the contrary. It appears from that decision that the enforcement of criminal laws by proper investigation could outweigh presidential privilege, whereas a generalized

interest in informing the public or legislating (*see, e.g., Senate Select Committee On Presidential Campaign Activities* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974)) would not. The Fourth Amendment, by the terms of its own Warrant Clause, recognizes law enforcement as a permissible ground for intrusion on privacy, but has no comparable exception for "historical accuracy" or for the "availability of documents for successive administrations." And the district court's concluding suggestion that "government investigation or prosecution of suspected Communists" was "not an admirable spectacle" and, therefore, grounds for invalidating the search may reflect the personal view of the district court but finds no support in the *Stanford* opinion. It would, we believe, be an equally less than admirable spectacle if any court were to sustain this Act because its subject is Richard Nixon and not the "suspected Communists" involved in the *Stanford case.*

2. *The seizure of private materials is not justified by any compelling governmental interest*

The right of privacy guaranteed by the Fourth Amendment is not, of course, absolute. *See Roe* v. *Wade,* 410 U.S. 113, 153-154 (1973). It is clear, however, that the Act's incursion into this fundamental right "may be justified only by a compelling state interest," and that the Act "must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155. Even though the right of privacy is not expressly mentioned in the Constitution, this Court has recognized its status among the basic fundamental rights of the individual. *See Griswold* v. *Connecticut,* 381 U.S. 479 (1965). This should be particularly true in this case where the legislation invades a man's papers,

"the dearest property a man can have." *Entick* v. *Carrington,* 95 Eng. Rep. 807 (1765).

No interest other than congressional distrust of Mr. Nixon or its desire to obtain all information about his private political thoughts and actions justifies the refusal to permit him to be the judge of those materials that are private. The district court did not supply any reason for the refusal to leave this task with the former President; it viewed the problem as one presented by "the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives" (J.S. App. 87a) and assumed that someone other than the former President had to make the judgments separating the private from the non-private.

Distrust of Mr. Nixon's selection criteria is no more permissible, as a legislative judgment, in this area than it is with regard to our bill of attainder claim (see pp. 130-141, *supra*). In light of the expectation that he would be able, at some future date, to sort out his private materials, and in light of the consistent practice of prior Presidents, it is unfair and unreasonable now to deny him that right. Indeed, as we have noted, even when criminal investigations are involved, the sorting process is done by the person upon whom the subpoena is served; the prosecutor must ordinarily be satisfied with the witness' sworn testimony that he has produced whatever is called for.

3. *The wiretapping analogy is erroneous*

The district court justified the Act's admitted intrusion on privacy rights by relying on an analogy to Title III of the Omnibus Crime Control and Safe

Streets Act of 1968, 18 U.S.C. 2510-2520 (1970), which has universally been held constitutional. It asserted that here, as with wiretapping, the problem is segregating conversations in which there is a legitimate interest from those which are entirely private. According to the district court, since Title III permits "intrusions into communications that may be both unconnected to legitimate government objectives and intensely private" (J.S. App. 80a), this Act may constitutionally authorize similar intrusions. But the analogy fails for several reasons.

First, electronic surveillance depends, almost by definition, on the subject's ignorance of the existence of the surveliance. There is no way that a wiretapping operation could succeed if the subject were told to advise the eavesdropper whenever his conversation was to be a private one. On the other hand, as we have indicated above, Mr. Nixon might well have been given the task—which all his predecessors assumed—of separating the personal and political from the official. Indeed, the district court observed that a law which was entirely prospective would present no problem because a President might then, while in office, segregate his private materials from official documents or choose not to retain personal notes. But, of course, if distrust of a President's presumed inherent bias—noted by the district court as a reason for third party screening—lies beneath such a statute, deliberate misclassification could not be prevented as to future Presidents except by insisting in every instance on review of *all* their outgoing files—both personal and official. There is, we submit, a major difference, therefore, between the surveillance undertaken of a suspected criminal and the effort made by Congress to oversee the sorting criteria applied by a President.

Second, the electronic surveillance procedure has been carefully designed to meet constitutional standards. In *Berger* v. *New York,* 388 U.S. 41 (1967), this Court invalidated a New York wiretapping and eavesdropping statute on its face because the statute—which required prior judicial authorization for the taps—failed to spell out "precise and discriminate" requirements the Court held required under the Fourth Amendment as a precondition to any governmental intrusion into constitutionally protected private communications. These requirements included: (1) a prior judicial authorization, (2) specification of a particular criminal offense said to justify the intrusion, (3) specification "with particularity" of the conversations sought to be seized, (4) minimization of the duration of the wiretap, (5) termination once the conversation sought is seized, and (6) a showing of *exigent* circumstances justifying use of the wiretapping form of search and seizure. In the absence of these "precise and discriminate" requirements, the *Berger* court held that a state statute authorizing wiretapping was on its face invalid as authorizing the precise equivalent of the "general warrant" condemned by the Fourth Amendment—even though the searching officer's discretion in that case was checked at least by prior judicial authorization.

Title III of the Omnibus Act was drafted to meet the standards of *Berger* v. *New York* and to conform with *Katz* v. *United States,* 389 U.S. 347 (1967). The Congress took explicit note of each of the above enumerated "precise and discriminate" limitations on the wiretapping powers spelled out in *Berger,* and accordingly constructed the federal wiretapping statute around these limitations because the Fourth Amendment demanded no less.

In contrast to the Omnibus Act, the Act here authorizes acquisition of the contents of more than five years of the former President's past conversations and documents by a scheme which dispenses with every one of the "precise and discriminate" criteria spelled out in Title III to conform with the requirements of the Fourth Amendments. For example, among the "precise and discriminate" standards *Berger* demands as a precondition to constitutional wiretapping is the rejection of New York's "evidence of crime" formulation in favor of a "belief that a particular offense has been or is being committed. . . ." In this Act, no such specificity exists. Rather, privacy is invaded "under the rubric of preservation of an accurate and complete historical record" (J.S. App. 48a-49a). It is hard to conceive of a broader and less discriminating standard for governmental invasion of personal rights.

Nor—contrary to the district court's assertion—does the instant statutory scheme "parallel" to any degree Title III's limitation of wiretapping to cases when "normal investigative procedures have failed or would be likely to do so" (18 U.S.C. 2518(3)(c). Indeed, the precise opposite of this assertion is more accurate. There is no reason why "normal investigative procedures"—such as a request to appellant or his counsel to produce properly described categories of materials, or judicially authorized subpoenas or search warrants —would not have fully served any legitimate governmental interest while eliminating any need to invade materials acknowledged by the court below to be beyond the scope of permissible governmental intrusion. Nothing substantiates any claim that recourse to unilateral governmental seizure and involuntary examination of the materials in issue was necessary to prevent destruction.[69]

The district court's concession that the Act does not, in its statutory provisions, require "minimization" of the intrusion (J.S. App. 81a) demonstrates that this "precise and discriminate" standard is also lacking. In fact, the hearings held on the Administrator's proposed regulations indicate that, even to the slight extent that the Administrator is seeking voluntarily to reduce invasions of privacy, he is rebuffed by the Congress. *See, e.g., Hearings on GSA Regulations to Implement P.L. 93-526 Before the Senate Comm. on Government Operations,* 93d Cong., 1st Sess. (1975) (remarks of Senator Nelson).[70]

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[69] Under the depository agreement (J.S. App. 134a-138a) the government was guaranteed that *nothing* would be destroyed for three years. Under this agreement, Mr. Nixon, unlike his predecessors, gave the government joint control over every single document and tape recording contained in the presidential materials, even denying himself *access* without the presence of the Administrator or his delegate (who would hold a key necessary for access) and barring himself from removing any materials for three years. The tape recordings under the agreement could not be destroyed for at least five years.

[70] The district court's other analogy (J.S. App. 79a-80a n. 57) is equally unsound. The ALI Model Code of Pre-Arraignment Procedure (1975) also sets "precise and discriminate" limitations. For example, section 220.5(1) at the outset commands the officer who is to execute the search warrant (emphasis added) "[to] endeavor by all appropriate means to search for and identify the documents to be seized *without examining the contents of documents not covered by the warrant.*" Included among those "appropriate means" is a request to the target of the search warrant that he screen the materials prior to seizure (section 220.5, note).

Indeed, section 220.5(2) states (emphasis added):

> (2) *Intermingled Documents. If the documents to be seized cannot be searched for or identified without examining the con-*

4. *The administrative search precedents require invalidation of this Act under the Fourth Amendment*

The district court discussed in a footnote the cases involving "civil" as opposed to "criminal" searches (J.S. App. 75a-79a n. 56), and implied at various points in its opinion that the rights accorded to crimi-

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tents of other documents or if they constitute items or entries in account books, diaries, or other documents containing matters not specified in the warrant, the executing officer *shall not examine the documents* but shall either impound them under appropriate protection where found, or seal or remove them for safekeeping pending further proceedings pursuant to subsection (3) of this section.

The explanatory note to subsection 2 makes clear that the process of review of the documents, to resolve disputes over the limitations of the proposed search, is entrusted *not* to the governmental authority commanded to do the searching in the first instance, but rather to a judicial authority (emphasis added):

> When the "intermingling" problem is inescapably present, *the search is taken out of the hands of the officer executing the warrant*, who becomes a custodian of the intermingled documents, charged with their safekeeping until the provisions of subsection (3) come into play . . . .

The ALI Code analogy is also faulty because—as with the wiretapping analogy—the district court failed to recognize that the entire ALI Code structure is underpinned by the fact that it presupposes a search warrant (a) issued *ab initio* by a neutral magistrate and (b) limited to a particularized search in the context of specified crimes. Nothing in the Code suggests that the American Law Institute believes that a governmental authority could—consistent with the privacy values underpinning the Fourth Amendment—bootstrap its way into an "intermingled documents" problem by first defining its search objective in terms so broad and incapable of independent judicial definition that no room is left from the outset for the citizen's privacy.

nal suspects are somehow greater than for targets of administrative searches. This Court's decisions establish, we believe, that the reverse is true.

First, this Court's administrative search cases—and this Court's Fourth Amendment decisions generally—reject any notion that a citizen's privacy rights under the Fourth Amendment are somehow lessened if he is not the target of a search for evidence of crime.[71] In *Camara* v. *Municipal Court*, 387 U.S. 523, 530-31 (1967), the Court labeled such a notion a "rather remarkable premise" and rejected it as follows:

> But we cannot agree that the Fourth Amendment interests at stake in these inspections cases are merely "peripheral". It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Following this passage, the Court cited in a footnote Mr. Justice Brennan's dissenting views in *Abel* v. *United States*, 362 U.S. 217, 254-56 (1960), where, speaking for four members of the Court, it was said:

> One more word. We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other "civil" pro-

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[71] In view of Congress' "interest" in having the Administrator seize and review materials for purposes of their availability for "judicial proceedings" concerning, *inter alia*, "Watergate" (pp. 120-121, *supra*), it is a debatable proposition whether this statute is not in fact intended to serve as the equivalent of a search for evidence of crime.

> ceeding—such as matter bearing on the issue whether a man should forcibly be sent from the country. . . . I think it perverts the Amendment to make this distinction. The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials: the "right of the people to be secure in their persons, houses, papers, and effects." See *Boyd* v. *United States,* 116 U.S. 616, 627 [1886]. Like most of the Bill of Rights it was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike, whether accused of crime or not." *Weeks* v. *United States, supra,* 232 U.S. at page 392 [1914].

Thus, under this Court's administrative search cases, an individual's privacy rights in our society are as fully protected against governmental intrusions for "civil" as for "criminal" purposes. The meaning of "reasonableness" for measuring the permissible limits of a governmental intrusion on privacy cannot be changed simply by relabeling the purpose of the search "civil" as opposed to "criminal."

Moreover, under this Court's Fourth Amendment cases measuring the permissible scope of the government's intrusion into the constitutionally protected privacy zone even for "civil" purposes, the invasion detailed by this statute is invalid. These cases were reviewed by this Court in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), where the Court concluded that "commercial enterprises engaged in businesses closely regulated and licensed by the Government" are deemed to "accept the burdens as well as the benefits of their trade." *Id.* at 271. In the present

case, given the district court's own premises concerning the appellant's justifiable expectation of privacy, there is no basis for similarly *implying* appellant's consent to the retroactive intrusion into the zone of private conversations. Nor is there anything analogous to a "long history of judicial and public acceptance" (*Camara* v. *Municipal Court,* 387 U.S. 523, 537 (1967)) for the search here.

Finally, unlike health inspections, border searches for illegal aliens, or business records relating to firearms and ammunition, the proposed governmental intrusion on privacy here is anything but "modest" or "impersonal". Five years of a man's communications and conversations, including the most intimate communications with wife, children, priest, and lawyer—long recognized by our Anglo-Saxon heritage to be the subject of one or another evidentiary privilege—are being unilaterally and retroactively seized without notice, placed beyond appellant's dominion and control, and subjected to "comprehensive screening" by governmental agents, all for the purpose of preserving the historical record.

In their totality, the district court's various efforts to justify, by analogy, the Act's invasion of the former President's privacy reflect the difficulty the court experienced in dealing with what it described as a troublesome challenge" (J.S. App. 67a). We submit that the reason the Fourth Amendment challenge is so troublesome is that never before has this government, to our knowledge, in any context or at any time, attempted to seize the entire product of more than five years of a man's life. The magnitude of this intrusion upon the most intimate aspects of Mr. Nixon's and his

family's lives can never be adequately described. We can state, however, that it is an unprecedented invasion of personal liberties which cannot be countenanced under the Fourth Amendment to our Constitution.

B. The Act Violates Mr. Nixon's Rights of Free Speech and Association.

A President is not only the Chief Executive of the Nation; he is also, in the nature of our political process, the head of the national political party that has offered him to the electorate as its candidate. And a substantial part of his working time must be spent on partisan political matters which are not the duties prescribed by Article II of the Constitution. The same considerations that prevent a President from keeping his private and personal records separate from his official communications and documents also preclude segregation of partisan political materials. Mr. Nixon described the political side of his activities as follows (App. 173-74):

> Many [presidential materials] reflect the fact that the President also serves as the head of his political party. In this regard I and members of my staff would often correspond with federal, state and local political officeholders and local political party officials. Such correspondence usually dealt in major part with partisan political matters. I also received memoranda concerning purely political matters from members of my staff and other government officials. For example, during my term as President I was requested on innumerable occasions to address political gatherings. Prior to such appearances members of my staff prepared for my personal use a "briefing book". These note books contained exclusively political

material. They listed, for example, all of the local political officials who would be in attendance and would describe their biographical background, their positions on various issues, and often personal vignettes that would be helpful to me in meeting and talking with them. The briefing books also described the issues that would be of concern to the organization or people requesting the appearance. If the appearance was on behalf of a local politician, the briefing book would describe the strengths and weaknesses of both the candidate and his opponent and where they both stood on matters of local and national concern. The briefing books also set forth suggestions for my remarks. I would frequently edit these drafts, noting additional points I wanted to make, and generally recording my thoughts as they pertained to the appearance. It is my recollection that there were hundreds of such briefing books prepared for my use. Similar books were prepared on legislative strategy, press conference briefings and literally hundreds of meetings I had in Washington and elsewhere with business, labor, education, religious and other groups concerning the whole fabric of American society. These books were retained and are among my presidential materials.

As was the case with matters dealing with my duties as a constitutional officeholder, it was also my practice in my role as head of my political party to engage in extensive and frequent discussions with members of my staff, members of Congress, other officials of government, governors, and state officials and personal friends and associates concerning a multitude of political matters. Many of those discussions were held in the Oval Office or my office in the Executive Office Building. Such discussions included, for example, whether I should support certain candidates for elected office and, if so, what form that support

> should take. In these discussions purely personal matters were often inextricably intermixed with political matters, and it would be virtually impossible to separate the various combinations of views and opinions expressed in them.

The materials that have been seized by this Act contain, according to the above description, candid evaluations of political figures, recommendations for political strategy, appraisals of issues that are entirely political in nature and verbatim recordings of discussions concerning "a multitude of political matters." The term "political," as used in this sense, is not to be taken demeaningly. Partisan politics is an integral part of our democratic process. This Court recently reaffirmed the principle that "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments," and that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes,* 414 U.S. 51, 56-57 (1973). See also *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Button,* 371 U.S. 415 (1963).

Indeed, a fundamental premise of *Buckley* v. *Valeo,* 424 U.S. 1 (1976), which invalidated portions of a carefully considered and lengthily debated federal law on the ground that, in certain respects, it unconstitutionally restricted the right to engage in partisan politics, was that the kind of political activity that is the subject of this claim is at the heart of the First Amendment. This Court began its discussion of "general principles" by observing that limitations on political contributions and expenditures relate to "an area of the most fundamental First Amendment ac-

tivities." 424 U.S. at 14. It said that discussion and debate over campaign issues and qualifications "are integral to the operation of the system of government established by our Constitution" and that "[t]he First Amendment affords the broadest protection to such political expression. . . ." 424 U.S. at 14. The view of the Court on the centrality of partisan political activity to the protection afforded by the First Amendment was manifested by its quotation, with approval, of the language in *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971) (quoted in 424 U.S. at 15):

> [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

It was argued in *Buckley* v. *Valeo* that since the statute there under consideration directly affected only the expenditure of funds, it constituted regulation of "conduct" and not "speech," and that only the "time, place and manner" of speech was controlled. This Court rejected those arguments in large part because it concluded that the statute's expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19.

The Act in question here deals directly with political speech. It subjects to outside examination by government employees—and to probable public scrutiny—more than five years' worth of the most intimate political communications of the man who was the head of the Republican Party, including nearly three year's worth of verbatim recordings of political briefings and strategy sessions conducted in Mr. Nixon's offices

or over his telephones, together with the former President's own personal evening reflections and judgments on political candidates and issues. The effect of such examination and disclosure is felt directly by the appellant, as an individual whose political expression is, by government fiat, seized and held up for microscopic public scrutiny. Even more important, however, is the effect that such a law, if constitutional, has on future Presidents or other high public officials whose own materials might someday be similarly seized. It necessarily inhibits their freedom of political activity and thereby reduces the "quantity and diversity" of the political speech and association that the Nation will be receiving from its leaders.

Like any other citizen, Mr. Nixon's right to express freely, in private, his personal views, which he may not wish publicized, on various political issues is protected by the Constitution. These rights are not waived by becoming a politician, any more than they are waived by becoming a school teacher or a policeman. *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 485-490 (1960); *City of Carmel-by-the-Sea* v. *Young,* 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 255 (1970). This Court has repeatedly recognized the manifest necessity of protecting the First Amendment rights of individuals in the political arena. *E.g., Bond* v. *Floyd,* 385 U.S. 116, 131-137 (1966); *Barr* v. *Matteo,* 360 U.S. 564 (1959). No one can seriously deny that a President or former President has the right to speak freely on subjects of partisan debate. And critical to public advocacy is the private formulation and discussion of political thought and perspective. This is a process of experiment and development. Stifling the trial and error aspect of the creation of political thought can frustrate the ultimate product as effectively as direct sanctions on speech itself.

The district court acknowledged that such First Amendment interests were implicated by the Act, and that public disclosure of Mr. Nixon's private political discussions would inhibit his future freedom of expression and would "chill" the future expression of other political figures (J.S. App. 89a-91a). It sustained the Act, however, on the ground that in the actual implementation of the law, the Administrator may construe his own proposed exception for materials involving "personal privacy" as covering "the privacy in political association protected by the First Amendment" (J.S. App. 91a n. 65). Because such a reading and application is "possible," the court held that it need not assume that political discussions will be disclosed. And it concluded, much as it had done on the subject of privacy, that "review by professional and discreet archivists" who would then "privately know the contents of materials" relating to Mr. Nixon's private partisan political activities, would not substantially impair his own political activities or "chill" the activities of others (J.S. App. 91a-92a).

By thus deferring until a later event consideration of appellant's constitutional claim because of the leeway provided the Administrator, the district court ignored an established principle of this Court's First Amendment decisions: Whether or not the right of free expression will be sustained may not be left by the legislature to the "unbridled discretion" of a government official. A statute which vests such broad authority is unconstitutional on its face, and the party subject to it may treat it as a nullity ***even if its actual implementation would not harm him.***

This constitutional principle was initially announced in *Lovell* v. *Griffin,* 303 U.S. 444, 452-453 (1938); where a municipality's system of advance licensing for the distribution of literature was found invalid, and this Court ruled that "it was not necessary for appellant to seek a permit under it." The doctrine has been applied in more recent decisions as well. *E.g., Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 150-51 (1969); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Staub* v. *Baxley,* 355 U.S. 313, 319-21 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 538-41 (1945).

In the *Cox* case, this Court enumerated the dangers of an overbroad delegation in the First Amendment area (379 U.S. at 557-58; citations omitted):

> This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

The critical point in the *Cox* case was that there were no provisions in the governing statute establishing standards for the determination of local officials as to which assemblies to permit and no administrative regulations limiting the broad power conferred by statute. 379 U.S. at 556. In this case, the statute is totally silent on the subject of political expression. The Administrator's proposed regulations—except with the extraordinary emendatory construction given by the district court's footnote 65—provide no suggestion that political exchange is given any weight at all. And even if "personal privacy" is modified as the court below would modify it, the ultimate decision as to which political dialogue to publish in the interests of history and which to restrict is left to the total discretion of the corps of "discreet archivists" headed by the Administrator. In the First Amendment area, such unguided authority is totally impermissible.

The alternative to striking the Act down because of its delegation of overbroad authority to the Administrator is to wait until he makes individualized judgments on particular conversations or memoranda reflecting political exchanges. The burden of litigating each such decision is surely one of the elements underlying the result reached in *Cox* and its predecessors. In addition, by leaving this sensitive First Amendment judgment to the Administrator, the Act encourages invidious discriminations as well as censorship of material that the Administrator, in his own judgment, would not like to have disclosed.

Since the district court, and even the appellees (see J.S. App. 91a-92a n. 65) appear to acknowledge a First Amendment interest in these materials, we will not burden this lengthy document with additional elaboration of the basis for such a claim. We would, how-

ever, direct the Court's attention to the very practical conclusion of a man who was both son and adviser to a former President who has been held in high esteem:

> Out of respect for history, few would like to see actual recorded facts intentionally blotted out of human knowledge. On the other hand, privacy is of particular importance to a politician. In our history, for example, we have had two former Presidents enter the halls of Congress: John Quincy Adams in the House and Andrew Johnson in the Senate; one former President, William Howard Taft, became Chief Justice of the United States.
>
> Certainly, premature disclosure of the intimate, subjective, combative exchanges behind the doors of the Oval Office could easily damage the usefulness of former Presidents who wish to continue in public service. And the quality of the advice a President would receive in office would certainly degenerate, or be unrecorded, if advisors spoke "for the record," conscious that their words would be made public at the end of a President's term.

John S.D. Eisenhower, "Those Presidential Papers," *The New York Times,* January 12, 1975. If this Act had no detrimental effect other than to undermine the ability of present and future officeholders to benefit from freewheeling, private discussions concerning political options and alternatives because advisers who someday wish to enter the public arena on their own may retreat from what might later be viewed as an unpopular position, it would be an unconstitutional infringement of the First Amendment. In addition, however, publication of the private political beliefs and actions of a public figure, which results in the immediate enlightenment of the public as to his innermost political thoughts and associations also defeats the free and open exchange of ideas by reducing the effectiveness of the Nation's leaders. On this basis, the Act must be declared invalid.

C. The Convergence Of First And Fourth Amendment Principles Requires Invalidation Of The Act.

We have discussed separately the former President's right of privacy and his rights of political expression and association because each is independently violated by this legislation. But we note, in concluding this section of our argument, that this case involves a "convergence" of those rights—a factor that has been invoked in several areas where this Court has evaluated the constitutionality of governmental action.

In *United States* v. *United States District Court,* 407 U.S. 297, 313-314 (1972), the invalidity of warrantless eavesdropping in "domestic security" cases was based principally on the Fourth Amendment. This Court's opinion noted, however, that the case was not merely one involving the right of privacy, but that—given the usual nature of "national security cases"—the intrusion by governmental authority presents "greater jeopardy to constitutionally protected speech." The Court warned that "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." 407 U.S. at 314. Similar need for greater Fourth Amendment protections exists when the "targets" are leading political figures whose partisan views may be popular at one time and highly unpopular at another. Here, as with "unorthodox" political beliefs, there are severe risks to national interests in free speech if overbroad invasions of privacy are permitted.

The "convergence" of First and Fourth Amendment interests was, of course, a factor in *Stanford* v. *Texas,* 379 U.S. 479 (1965), the leading "general warrant" decision on which we rely in our invasion-of-privacy argument. This Court cautioned in *Stanford* that the history of the Fourth Amendment (379 U.S. at 485; footnote omitted)

> . . . teaches . . . that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain . . . No less a standard could be faithful to First Amendment freedoms.

See also, Marcus v. *Search Warrant,* 367 U.S. 717 (1961). In this case, the added and important dimension of the First Amendment is present. The Act seizes and examines papers and conversations totally protected by the constitutional safeguard for free expression.

D. Archivists, Even If "Professional And Discreet," Do Not Satisfy The Constitutional Standard.

In discussing both the First and Fourth Amendment claims (as well as in other portions of its opinion) the district court minimized the Act's effect on appellant by describing the prospective reviewers of his materials as "discreet and professional" archivists with "an unblemished record for discretion" (J.S. App. 83a, 88a). Because of the archivists' asserted distinguished personal qualifications, the intrusion resulting from their examinations were said to be slight.

There is, of course, nothing in the legislative record to establish the archivists' record as blemished or not; that question seemed farthest from Congress' mind. No professional standard is fixed by the Act, no oath or

other obligation of secrecy is imposed, and the district court's conclusion appears to rest more on the court's own extrajudicial admiration for history and historians than on any facts of record or those which might be judicially known.

We do not believe that this case should turn, however, on the reputations of historians in general, or of the particular corps of some one hundred archivists whom the Administrator might assign to the subject. One thing is clear: archivists are not judges. No matter how "professional and discreet" they may be, they cannot make the judicial evaluations that are essential to protect the Fourth Amendment. Nor, we submit, in view of their professional bias for historical preservation can they dispassionately balance the harm to political association against the interest in "accurate history" that would resolve the First Amendment issue.[72]

We are not alone in our skepticism of the neutrality or disinterest of the archivists. It was recently proposed that GSA archivists conduct an initial review—similar to the procedure approved here by the district court—of secretarial transcriptions of the telephone conversations of former Secretary of State Kissinger. In an opinion memorandum, the Legal Adviser of the Department of State concluded that such a procedure would not protect the interests of the Department. He referred to the "advocate's interest" of the GSA

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[72] The archivists' commitment to preservation and public availability of historical materials is, we submit, amply demonstrated by the numbers of government archivists, including the Archivist of the United States and Deputy Archivist, who are active members in the American Historical Association which has intervened in this suit to promote interests adverse to appellant.

(Memorandum of January 14, 1977, by the Legal Adviser of the Department of State, p. 4):

> Recently, the GSA has espoused a view that personal papers are limited to material pertaining solely to an individual's private affairs, and not at all to his official activities. This view implies that traditionally personal materials (like diaries, notes and family correspondence) which discuss a person's official activities, are official records. . . . This approach, among others, has also been suggested to the National Study Commission on Records and Documents of Federal Officials, which has the task of proposing for the first time, government-wide legislation on the personal-official paper distinction. In that forum, GSA is a proponent for a definition of official records that is inconsistent with Department of State regulations. In view of this advocate's interest, it would not seem appropriate for GSA archivists to preempt the Department of State by reviewing the notes in question.

This Court held in *United States* v. *United States District Court,* 407 U.S. 297, 317 (1972), that executive branch personnel involved in investigative and prosecutorial duty could not substitute for the "neutral and disinterested magistrates" that the Fourth Amendment demands. This judgment did not turn, of course, on whether the attorneys who would be acting for the executive branch were "professional and discreet." *See also Camara* v. *Municipal Court,* 387 U.S. 523, 532-33 (1967); *Johnson* v. *United States,* 333 U.S. 10, 14 (1948).

In this case, the constitutional judgments should be made by judicial officers. Archivists, regardless of their records, are not the group in whom the Constitution

vests that authority. Congress had an obligation to leave judicial questions to the courts, and its failure to do so, in both the First and Fourth Amendment areas, cannot be cured by the district court's repeated compliments to the profession that was unlawfully selected to assume the judges' responsibilities.

CONCLUSION

The Presidential Recordings and Materials Preservation Act is plainly not a routine federal statute. It deals with a situation that has been described in papers below as a "unique problem," and the Act is defended, in large measure, on the basis of the unusual events that led to its adoption. The Constitution stands, however, as a bulwark of enduring principle against the vicissitudes of political history and public opinion. In *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 528 (1935), this Court summarized the lessons of our constitutional development:

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be in both war and peace, but these powers of the national government are limited by the constitutional grants.

In this case, Congress has enacted legislation that could have a lasting and disruptive effect on the way our government is structured and how it has operated successfully for two centuries. The decision of the district court upholding Congress' improvident exer-

cise of power should be reversed with instructions to enter a declaratory judgment that Title I of the Act is unconstitutional and to issue a permanent injunction against implementation of it's provisions.

Respectfully submitted,

HERBERT J. MILLER, JR.
NATHAN LEWIN
R. STAN MORTENSON
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M St., N.W., Suite 500
Washington, D.C. 20037
Attorneys for Appellant

RAYMOND G. LARROCA
MARTIN D. MINSKER
WILLIAM H. JEFFRESS, JR.

APPENDIX

APPENDIX I

Public Law 93-526

NINETY-THIRD CONGRESS OF THE UNITED STATES OF AMERICA
AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

Delivery and Retention of Certain Presidential Materials

SEC. 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the "Administrator") shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Governmnt and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

SEC. 102. (a) None of the tape recordings or other materials referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpoena or other legal process. Any request by the Office of Watergate Special Prosecution Force, whether by court subpoena or other lawful process, for ac-

cess to such recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

REGULATIONS TO PROTECT CERTAIN TAPE RECORDINGS AND OTHER MATERIALS

SEC. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

REGULATIONS RELATING TO PUBLIC ACCESS

SEC. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or

change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any changes in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5)(A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An

amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a)(7).

(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

SEC. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation

which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

AUTHORIZATION OF APPROPRIATIONS

SEC. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.